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No. ..-....

IN THE

Supreme Court of the United States

October Term, 1981

JIM MCNEFF, INC., a California corporation,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Questions Presented.

1. Is a prehire agreement authorized by Section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f), enforceable in a suit brought under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, absent a showing that the union signatory to the agreement is the majority representative of the employer's employees?
2. Is a prehire agreement authorized by Section 8(f) of the National Labor Relations Act enforceable if it was entered into by an employer because of coercion by a union?

List of Parties to Proceeding Below.

Pursuant to Rule 21.1(b) of the Rules of the Supreme Court of the United States, a list of the parties in the proceeding below is submitted:

Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, John C. Maxwell, Dale I. Vawter, Jerald B. Laird, William Cobb, Jr., C.W. Poss, Verne W. Dahnke, Alexander Rados, William A. Floyd and Jerry Toll, each in his respective capacity as Trustee of the Operating Engineers Health & Welfare Fund; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, John C. Maxwell, William C. Waggoner, Dale I. Vawter, C.V. Holder, William A. Cobb, Jr., Alexander Rados, William A. Floyd, Edwin Kalish, Steve Billy, Winton Kemmis and Dean Sweeney, Jr., each in his respective capacity as Trustee of the Operating Engineers Pension Trust; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, Jerry Toll, William C. Waggoner, C.I.T. Johnson, Dale I. Vawter, Don McCoy, William A. Cobb, Jr., Alexander Rados,

William A. Floyd and Dean Sweeney, Jr., each in his respective capacity as Trustee of the Operating Engineers Vacation-Holiday Savings Trust; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, Robert Lytle, Dale I. Vawter, Kenneth J. Bourguignon, Verne W. Dahnke, Winton Kemmis, William A. Floyd and Don MacIntosh, each in his respective capacity as Trustee of the Operating Engineers Training Trust,

Appellees below,

Jim McNeff, Inc.,

Appellant below.

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No. ..-....

IN THE

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October Term, 1981

JIM MCNEFF, INC., a California corporation,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner, Jim McNeff, Inc., a California corporation, respectfully prays that a Writ of Certiorari issue to review the judgment of the U.S. Court of Appeals for the Ninth Circuit which was entered in this proceeding on February 8, 1982.[1]

OPINIONS AND ORDERS BELOW.

The Judgment and Opinion of the U.S. Court of Appeals for the Ninth Circuit, which was entered in this matter on February 8, 1982, is styled, *Frank L. Todd, et al. v. Jim*

[1]The within matter was numbered Case No. 80-5214 in the Court of Appeals. It is reported at 667 F.2d 800. Jim McNeff, Inc. was the Defendant-Appellant below, and Frank L. Todd, *et al.* were the Plaintiff-Appellees below.

McNeff, Inc., a California corporation, and is reported at 667 F.2d 800. It appears as Appendix A.

The U.S. District Court for the Central District of California entered its Order on February 11, 1980, which is not officially reported. The Order appears as Appendix B.

The Findings of Fact and Conclusions of Law of the U.S. District Court for the Central District of California were made on the record in oral argument on February 4, 1980. The transcript appears as Appendix C.

On July 10, 1979, the Regional Director of Region 21 of the National Labor Relations Board issued a dismissal letter refusing to issue complaint against Jim McNeff, Inc. based on a charge filed by the International Union of Operating Engineers, Local No. 12. The document appears as Appendix D.

On November 8, 1979, the General Counsel of the Board, by letter, denied the appeal of the action of the Regional Director. The document appears as Appendix E.

On November 17, 1980, the Board issued a Supplemental Decision and Certification of Results of Election which is not officially reported. The Decision appears as Appendix F.

JURISDICTION OF THE SUPREME COURT.

The judgment and opinion of the U.S. Court of Appeals for the Ninth Circuit was entered on February 8, 1982. No petition for rehearing, or for further hearing before the full Court, has been filed.

The jurisdiction of the U.S. Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED.

United States Code, Title 29:

§ 185(a) "Suits for violation of contracts between an employer and a labor organization representing

employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

§ 158(a)(5) "It shall be an unfair labor practice for an employer —

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

§ 158(f) "It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such

employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)."

Statement of the Case.

Statement of Facts.

Jim McNeff, Inc. ("McNeff, Inc.") is an employer engaged in business in the construction industry. In September of 1978, McNeff, Inc. was engaged in business as a subcontractor on a jobsite in Southern California. McNeff, Inc. employed three employees on the jobsite, none of whom were members of the International Union of Operating Engineers, Local No. 12 ("Union"). McNeff, Inc. was not signatory to any agreement with the Union.

On September 13, 1978, a representative of the Union approached Jim McNeff, President of McNeff, Inc., and informed him that McNeff, Inc. would have to sign the Master Labor Agreement ("Agreement") with the Union or leave the job. McNeff refused the ultimatum.

The Union representative left and returned with the general contractor who also informed McNeff that he would have to sign the Agreement if he wanted to continue on the site. McNeff then relented and signed the Agreement. He did not read the Agreement or intend to abide by its terms. McNeff then had all three nonunion employees sign union cards the same day.

McNeff, Inc. never complied with the Agreement. From October, 1978 to March, 1979, the union trust funds sent reports to McNeff, Inc. for their completion and return. McNeff, Inc. returned the forms each month and wrote upon

them that "no members of this craft were employed during this month."

One month after the first form was returned to the trust fund, the trustees requested an audit of McNeff, Inc.'s books. An audit was eventually conducted and the trustees claimed $5,316.79 to be due the trusts.

Proceedings Below.

On April 26, 1979, trustees filed a breach of contract suit against McNeff, Inc. pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, in the Federal District Court for the Central District of California.

On May 22, 1979, McNeff, Inc. filed a petition with the National Labor Relations Board ("Board") seeking a representation election among all of its employees performing operating engineer work as delineated in the Agreement.

On June 4, 1979, the Union filed a charge with the Board against McNeff, Inc. alleging that McNeff, Inc. had violated Section 8(a)(5) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(a)(5), by repudiating and failing to comply with the Agreement.

On July 10, 1979, the Regional Director of Region 21 of the Board, by letter, dismissed the Union's charge and refused to enforce the Agreement, noting that a full collective bargaining relationship had not been established. The Director refused to hold that the Union had perfected a full collective bargaining relationship on the basis of the union membership of the three employees who were instructed to join the Union.

The Union appealed the action of the Regional Director to the General Counsel of the Board. On November 8, 1979, the General Counsel denied the appeal. The General Counsel noted that McNeff, Inc. was forced to sign the Section 8(f) agreement.

On January 23, 1980, an election among McNeff, Inc.'s operating engineer employees was conducted by the Board. The results were not conclusive at that time because of official challenges to certain ballots and the filing by the Union of objections to the conduct of the election.

The trustees filed for a motion for summary judgment and McNeff, Inc. filed a cross-motion for summary judgment in the trustee action. On February 4, 1980, counsel for trustees and McNeff, Inc. were heard on their motions in open court.

On February 11, 1980, the District Court entered its Order granting the trustees' motion for summary judgment and denying defendant's motion for summary judgment. In the Summary Judgment Order the District Court found that the trustees had shown entitlement to the judgment as a matter of law.

McNeff, Inc. appealed the decision to the Court of Appeals for the Ninth Circuit. On October 8, 1981, oral argument was held before the Court in Los Angeles, California.

On November 17, 1980, the Board issued its Supplemental Decision and Certification of Results of Election, certifying that a majority of McNeff, Inc.'s employees did not vote for the Union and that the Union is not the bargaining representative of the employees.

On February 8, 1982, the Court issued its judgment and opinion.

The Decision of the Court of Appeals Below.

The "major issue" of the case before the Court was whether minority prehire agreements are enforceable in Section 301 litigation. The Court reviewed the wide split of authority on this issue which has developed since this Court's decision in *N.L.R.B. v. Local Union No. 103, Iron*

Workers (Higdon Contracting Co.), 434 U.S. 335 (1978). The Court reviewed the positions of the Eighth and Tenth Circuits, which have held minority prehire agreements to be enforceable in Section 301 litigation, and the contrary position of the Fifth Circuit which has held such agreements unenforceable until the union involved obtains majority status.

The Court then opted for what it called the middle position. The Court held that prehire agreements are enforceable despite a union's lack of majority status. However, the employer in such a circumstance can repudiate the agreement if the union has not achieved majority status. After such a repudiation the minority agreement is no longer enforceable. The Court held that McNeff, Inc., as a matter of law, had not repudiated the Agreement and that the Agreement was therefore valid until the lawsuit was filed.[2] The Court held that McNeff, Inc 's noncompliance with the agreement did not constitute repudiation.

The Court also rejected the position of McNeff, Inc. that this Court's decision in *Higdon* authorized only the voluntary acquisition of prehire agreements and that the agreement was therefore not enforceable. The Court specifically did not pass on whether the Union's conduct amounted to coercion.[3] The Court held that such a resolution was not

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[2]The Court apparently held that the filing of the suit constituted knowledge of the employer's repudiation as a matter of law and that liability was cut off at that point. In making this determination the Court, *sub silentio*, found that the union had not obtained majority status because there could be no repudiation once majority status was achieved. The Court did not otherwise address the issue of whether in fact the employees of McNeff, Inc. had designated the union as their majority representative.

[3]Petitioner does not request that this Court decide this issue. For purposes of argument, it will be assumed the Union's conduct amounted to coercion.

necessary because the issue of coercion can only be raised at the time of repudiation.

The Court only mentioned that unfair labor practice charges had been filed in the matter and that the General Counsel had declined to prosecute the case on the ground that a full collective bargaining relationship had not been established. The Court did not mention the outstanding election that had been conducted by the Board among McNeff, Inc.'s employees.

REASONS FOR GRANTING THE WRIT.

Introduction.

This Court, in *N.L.R.B. v. Local Union No. 103, Iron Workers (Higdon Contracting Co.)*, 434 U.S. 335 (1978), held that prehire agreements authorized by Section 8(f) of the Act did not ripen into collective bargaining agreements until the union obtained the majority support of the employer's employees. The issue was presented to this Court when a Court of Appeals refused to enforce a Board order which was based on the Board's position that minority prehire agreements are not enforceable. Since the *Higdon* decision, courts have differed on the applicability of the *Higdon* decision in suits brought under Section 301 of the Act to compel compliance with such minority prehire agreements.

As noted by the Court below, its decision constituted the third separate and conflicting opinion among the Courts of Appeals on this issue. A fourth approach has been adopted by certain federal district courts and has been considered, but not yet adopted, by the Courts of Appeals. These conflicts are causing confusion and uncertainty in the construction industry and need to be resolved by the review of these issues.

Furthermore, the decision of the Court below greatly fragments national labor policy and directly conflicts with this Court's prior holdings in *Higdon* and *Howard Johnson Co. v. Detroit Joint Board*, 417 U.S. 249 (1974).

The Court below held that the prehire agreement involved was enforceable even though the National Labor Relations Board refused to enforce the agreement under the provisions of Section 8(a)(5) of the Act. This was not the case of two tribunals with concurrent jurisdiction reaching separate results based on different interpretations of the facts. It was

the case of two forums deciding the same issue based on differing labor policies. As the Court below noted, the General Counsel of the Board declined to proceed on this case on the ground that the Union had never obtained majority support, and, thus, a full collective bargaining relationship had never been established. The Court below, however, refused to hold the minority status of the Union to be determinative. The Court instead held that the enforceability of prehire agreements hinged on the existence or lack thereof of an affirmative repudiation by the employer. Thus, there are two separate and conflicting national labor policies administered within the geographic boundaries of the Ninth Circuit.

This dual national labor policy conflicts with this Court's holding that the effectuation of national labor policy was committed by Congress primarily to the National Labor Relations Board, subject to limited judicial review. *Higdon*, 434 U.S. at 350. Furthermore, the decision of the Court below in granting relief under Section 301 of the Act, when national labor policy precludes such relief under Section 8(a)(5) of the Act, directly conflicts with this Court's clear admonition in *Howard Johnson* that "basic policies found controlling in an unfair labor practice context" may not be "disregarded by the courts in a suit under § 301 . . . ." *Howard Johnson*, 417 U.S. at 256.

Thus, there is not only a split among the Courts of Appeals, there are dual national labor policies existing within several of the circuits. As is demonstrated in this matter, these dual national labor policies have resulted in clashes between the courts and the Board over the resolution of the same claims arising from prehire agreements.

The decision of the Board not to proceed on this matter was based on the wishes of the employees. This approach adhered to the principles adopted by this Court. This Court,

in *Higdon*, condemned the use of "top-down" organizing and noted that Congress, in permitting the existence of prehire agreements, did not condone the imposition of a minority union over the wishes of the employees. This Court emphasized that any party could seek a representation election before the Board despite the existence of the prehire agreement. This Court adamantly rejected the acquisition of such prehire agreements by coercion. *Higdon*, 434 U.S. at 347-49. Despite this, the Court below did not focus its inquiry on employee wishes. Instead it based its decision on notification by the employer of repudiation of the prehire agreement. Furthermore, it held that minority unions which obtain prehire agreements by coercion may, nevertheless, impose their will on the employees until notice of repudiation. Finally, since it held that the minority status of a union was not determinative, it rendered the election procedures of the Board meaningless.

The decision below, thus, adversely affects the construction industry and federal labor policy. The wishes of construction employees are not controlling and their recourse to utilize the procedures of the Board to preserve their interests has been taken away. Employers, employees, unions and trust funds are subjected to conflicting determinations by different tribunals within the same geographic jurisdiction and are subjected to different national labor policies in the various circuits.

ARGUMENT.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *N.L.R.B. v. LOCAL UNION NO. 103, IRON WORKERS (HIGDON CONTRACTING CO.)*, 434 U.S. 335 (1978).

A. Minority Prehire Agreements Are Unenforceable.

The pivotal question before the Court of Appeals was: is a Section 8(f) prehire agreement enforceable absent a showing that the union is the majority representative of the employer's employees? That was the same question presented to this Court in *N.L.R.B. v. Local Union No. 103, Iron Workers (Higdon Contracting Co.)*, 434 U.S. 335 (1978). The Court of Appeals and this Court are in conflict on the answer to this question, and this conflict requires prompt resolution by this Court.

In *Higdon*, this Court reviewed the Board's interpretation of Section 8(f) and its interplay with "other sections of the Act, primarily Sections 8(a)(5) and 8(b)(7)(C)". *Id.* at 341. After an extensive analysis of legislative history, this Court adopted the position of the Board.

The cornerstone of this Court's decision was based on the wishes of the employees. This Court noted that the Board's position was rooted in the statutory policy that a union should not act as the collective bargaining agent for employees unless it is the voice of the majority of the employees. *Id.* at 344. This Court then reiterated its prior holding in *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975), that one of the major aims of the 1959 Act was to limit "top-down" organizing. This Court emphasized that such Congressional concern "did not evaporate as the focus turned to the construction industry" and admonished that the convenience afforded the construction industry to enter into prehire agreements was not meant

to "be portrayed as an expression of the employees' organizational wishes." As this Court observed, a proviso to Section 8(f) was added to ensure that an election could be demanded despite the existence of the prehire agreement. *Higdon*, 434 U.S. at 347-49.

Despite this Court's concern for the will of the employees, the Court below has held that minority prehire agreements are enforceable until notice of repudiation.

To support its position, the Court below reviewed this Court's *Higdon* decision and noted that this Court, in one instance, labeled prehire agreements "voidable". The Court below then reasoned that the employer must actively repudiate such an agreement and further held that noncompliance with the agreement does not constitute such repudiation.

The Court below thus focused its attention on the conduct of the employer rather than the will of the employees. This approach makes employee union sentiment irrelevant and places the control of union designation in the hands of the employer. Nothing could be more inconsistent with the purposes of this Court's ruling.

Furthermore, the isolation of the term "voidable" ignores the numerous statements by this Court that the enforceability of a prehire agreement is *contingent* on the union obtaining majority support among the employer's employees. This Court repeatedly embraced the Board's position that it is encumbent on the union to establish the fact of majority

status before a tribunal can hold an agreement to be enforceable.[4]

Most telling, this Court in *Higdon* specifically reviewed and adopted Board decisional authority which specifically rejected the analysis of the Court below. In accepting the Board's interpretation of national labor policy, this Court commented extensively on the Board's landmark decision in *R.J. Smith Construction Co.*, 191 NLRB 693 (1971).

In *R.J. Smith*, the employer had totally ignored the prehire agreement since its inception. The union sought to recover past wages allegedly lost by the employees under the agreement. Such a claim would be honored by the Court below since there was no active repudiation. The Board, however, held that the majority status of a union may be examined, at any time during a prehire agreement, in the litigation of refusal to bargain charges. Indeed, the Board's dissenting members admonished that the Board's position meant that such agreements can be "ignored with impunity".

The Board decision in *Higdon* also rejected the analysis of the Court below. *Ironworkers Local 103 and Higdon Contracting Co.*, 216 NLRB 45 (1975). In *Higdon* the employer had signed and honored a prehire agreement on some jobsites, but had ignored it on other jobsites through the operation of another corporate entity which the Board held

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[4]This Court reviewed Board law which held that the duty "to honor the contract is contingent on the union attaining majority support" and that an employer does not violate Section 8(a)(5) when it "refuses to honor the contract" and the "union fails to establish in the unfair labor practice proceeding that it has ever had majority support." *Higdon*, 434 U.S. at 345. At other places in its decision this Court again noted that the Board will not issue a Section 8(a)(5) bargaining order against an employer refusing to honor a prehire agreement "unless the union can demonstrate its majority status." *Id.* at 344. This Court also noted that the Board emphasized in the *Higdon* case that the union involved had not achieved majority support and the prehire agreement therefore "had no binding force." *Id.* at 340.

to be an alter ego. The administrative law judge before the Board distinguished the *R.J. Smith* decision by noting that the employer was trying to abide by the agreement and ignore it at the same time. The judge further noted that the employer did not actively repudiate the agreement and held that it was not privileged to ignore the agreement in such a manner.

In review, the Board specifically commented on and rejected the judge's requirement of an active repudiation by the employer. The Board noted that the employer had indeed ignored the agreement on certain projects and that it was privileged to do so if the union had not obtained majority status. This Court then adopted the Board's holding.

Finally, this Court, in *Higdon*, specifically dealt with the applicability of its holding to Section 301 suits, such as the case in issue. In rejecting the union's position that its holding was inconsistent with one of its prior determinations, this Court explained that its earlier ruling concerned the jurisdiction of federal courts to entertain suits on Section 8(f) contracts. This Court then stated:

> That a court has jurisdiction to consider a suit on a particular contract does not suggest that the contract is enforceable. It would not be inconsistent . . . for a court to hold that the union's majority standing is subject to litigation in a § 301 suit to enforce a § 8(f) contract . . . and that absent a showing that the union is the majority's chosen instrument, the contract is unenforceable. *Id.* at 351-52.

The Court below has now held that absent a showing of majority status, the contract *is* enforceable. Only the affirmative notice of repudiation can stop the imposition of a minority union on the employees. During this time the minority union can enforce its union security clause and take

other action inconsistent with the wishes of the employee majority.[5]

B. The Decision Below Renders the Election Process of the Act Meaningless.

This Court, in *Higdon*, noted that the proviso to Section 8(f) provides that prehire agreements shall not bar a petition for an election under the Act. The Court emphasized that the "employer and its employees — and the union for that matter — may call for a bargaining representative election at any time". *Higdon*, 434 U.S. at 345. This Court reasoned that this proviso evidenced the intent of Congress that prehire agreements were not meant to be imposed on employees despite their wishes. *Id.* at 349.

This Court specifically noted the Board's analysis of the election proviso set forth in the Board case of *R.J. Smith Construction Co., supra*. In *R.J. Smith*, the Board stated:

> Inasmuch as Congress clearly intended to permit a test, by petition, of majority status . . . at any time during the contract, it would be anomalous, indeed, to hold that Section 8(f) prohibits examination of those questions in the litigation of refusal-to-bargain charges. 191 NLRB at 694.

The same anomalous result flows from the enforcement of minority prehire agreements through the litigation of Section 301 breach of contract cases.

A call for an election is totally irrelevant in the Eighth and Tenth Circuits since these Courts have held that minority agreements are enforceable in any event. *Contractors, etc. v. Associated Wrecking Co.*, 638 F.2d 1128 (8th Cir. 1981);

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[5]Indeed, the employees in this case were sent to join the union only after their employer was coerced into signing the agreement. This coercive utilization of top-down organizing is the very evil which this Court condemned in *Higdon*.

New Mexico Dist. Council, etc. v. Mayhew Co., 664 F.2d 215 (10th Cir. 1981). An election petition filed by an employer in the Ninth Circuit would only be relevant as evidence of repudiation. But the same would not be true for a petition filed by employees since it is the employer's repudiation which is crucial to the Court below. And, in the Ninth Circuit, an election would not be relevant for any point prior to repudiation even when the affected employees were eligible to vote in the election.[6]

These results stem from the fact that these Courts of Appeals do not focus their inquiry on the will of the employees. As such, the election process, which was an integral part of the Congressional scheme in enacting Section 8(f), does not fit into the analytic scheme fashioned by these Courts of Appeals.

These results also conflict with the decisions of this Court in *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964) and *South Prairie Construction Co. v. Local 627, Int'l. Union of Operating Engineers (Peter Kiewit)*, 425 U.S. 800 (1976).

In *Carey*, arbitration was sought pursuant to an enforceable collective bargaining agreement with a particular union. The nature of the grievance involved possible conflicts with employees represented by another union and the employer refused to arbitrate, contending that the Board had exclusive jurisdiction over such disputes. This Court noted that if the controversy were essentially a representational matter, the

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[6]The Board has often included past employees as well as present employees in elections in the construction industry. The Board often uses a special voter eligibility formula in the construction industry due to the fluctuation of the work force in the industry. *Daniel Construction Co.*, 133 NLRB 264 (1961).

It is for the Board to determine employee eligibility requirements in each case. *See, South Prairie Construction Co. v. Local 627, Int'l. Union of Operating Engineers (Peter Kiewit)*, 425 U.S. 800 (1976).

employer could protect itself by invoking the procedures of the Board. *Carey*, 375 U.S. at 268. Since the employer had not yet invoked the procedures of the Board, this Court refused to halt arbitration based upon speculation that a final result may conflict with Board law. This Court did, however, state that upon the Board's review of the arbitrator's award, if the Board disagreed with the arbitrator, then, "the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with that ruling, it would not be liable for damages under § 301." *Id.* at 272. The Court also noted that the "*superior* authority of the Board may be invoked at any time." (Emphasis added) *Id.* at 272.

In *South Prairie Construction Co. v. Local 627, Int'l. Union of Operating Engineers (Peter Kiewit), supra*, this Court vacated the judgment of a Court of Appeals which, upon review of a Board order, had determined, in the first instance, a representation issue. The Board had not addressed the matter because it had disposed of the case on other grounds. This Court held that the representation issue should have been determined initially by the Board. This Court noted that the Board's decisions on such matters, if not final, are, nevertheless, "rarely to be disturbed."

It is clear that the Court below did not defer to the Board in its initial determination of the representation issue. The Court below went even further, it rendered the Board's representation proceedings meaningless. McNeff, Inc. had invoked the "superior authority" of the Board by filing a petition for an election.[7] The final result of the Board's exercise of such authority is now meaningless because the

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[7]The courts below should have deferred to the superior authority of the Board at the time the Board's authority was invoked.

majority status of the union is not relevant to the Court below.

Hence, the decision of the Court below, and those of the Courts of Appeals for the Eighth and Tenth Circuits, adversely affect employee rights and the national labor policy. This Court should take this opportunity to restore the basic federal labor policy of preserving employee free choice in the selection of bargaining representatives.

C. Only Voluntary Prehire Agreements Are Authorized by Higdon.

In its *Higdon* decision this Court repeatedly emphasized that Congress intended prehire agreements to be voluntary and that "no element of coercion" was intended to be permitted in obtaining such agreements. In reviewing legislative history, this Court noted Senator Kennedy's explanation to the Senate that the legislation was not intended to authorize coercion to obtain prehire agreements where the majority status of the union has not been established. *Higdon*, 434 U.S. at 348, n. 10, citing II *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 1715.

Despite this, the Court below sanctioned the acquisition of minority prehire agreements by coercion by holding that such issues can only be raised at the time of repudiation. No other Court of Appeals has adopted this ruling.

Thus, minority unions can obtain recognitional rights by coercion and, until repudiation, can effectively enforce union security clauses and otherwise adversely impose their will on the majority of the employees. This coercive representation can continue forever if the employer refuses to repudiate the agreement. Since such an employer once acquiesced to such pressure, this perpetual imposition of a union's will by coercion is more than a mere possibility.

This Court recently held in *Kaiser Steel Corporation v. Julius Mullins*, 70 L.Ed.2d 833, 102 S.Ct. ...., No. 80-1345 (January 13, 1982), that an employer may raise the illegality of a contract as a defense to a breach of contract suit brought by trustees pursuant to Section 301 of the Act. This Court did not limit such a defense to a point in time in which the employer repudiated the agreement or any other artificial time.

It is clear that Congress, the Board and this Court have condemned the coercive obtainment of prehire agreements. This Court has not yet determined if the coercive acquisition of prehire agreements can be raised as a defense to a breach of contract suit under Section 301 of the Act. This issue is an important issue involving our national labor policy and should be resolved by this Court. If an affirmative defense cannot be raised on this issue, unions can ignore the will of Congress and the decisions of this Court and reap the benefits from their misconduct.

D. Conclusion.

The facts of this case reveal that the employees are the ones to lose by the decision of the Court below. The Union did not attempt to organize the employees by soliciting their support. The employees were nonunion and were working on a project for a nonunion employer. They could expect to retain their positions without changing their status. Yet the Union threatened the employer and obtained its reluctant signature on the Agreement. The employees were then instructed to join the Union.

The Court below has sanctioned this tactic of top-down organization by coercion, and, as noted earlier, has effectively prevented the employees involved from utilizing the

Board's election process if they objected to the imposition of a minority union as their representative. Nothing could be more inconsistent with this Court's *Higdon* decision.

THE DECISION BELOW FRAGMENTS NATIONAL LABOR POLICY BY ESTABLISHING CONFLICTING DUAL POLICIES ADMINISTERED BY TWO DIFFERENT TRIBUNALS.

The national labor policy enforced uniformly throughout the nation by the Board is that prehire agreements are not enforceable absent a showing of union majority status. The Board has made it clear that the proof of majority status is a condition precedent to enforceability under Section 8(a)(5) of the Act. No affirmative repudiation by the employer is required to perfect the employer's defense.

This national labor policy is being eroded by the decision of the Court below and by those of the Eighth and Tenth Circuits. These Courts have developed their own national labor policies by holding minority-union prehire agreements to be enforceable in Section 301 litigation. The Eighth and Tenth Circuits have held them to be enforceable at all times. The Court below has held them enforceable until repudiation. The difference in these opinions is one of degree only. They all conflict with the national labor policy of the Board which has been embraced by this Court.

Unions and trust funds may now shop forums to obtain the more favorable national labor policy.[8] This case not only

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[8]The substantive remedies for breach of contract under Section 301 are no greater than those remedies available through the Board under Section 8(a)(5). If an employer refuses to honor an enforceable collective bargaining agreement, the Board, under Section 8(a)(5), can order the employer to honor the agreement and make back-payments for lost fringe benefits as well as lost wages. In *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962) this Court held that the Board and the courts have concurrent jurisdiction to resolve disputes when an unfair labor practice also constitutes a breach of contract.

involved shopping between two forums, it involved the utilization of both forums. One forum, the Board, rejected the claim based on its interpretation of national labor policy. The other forum then upheld the same claim based on its own national labor policy. Such a result is totally adverse to this Court's repeated insistence upon a uniform national labor policy.

In *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), this Court admonished that federal common law regarding enforcement of collective bargaining agreements under Section 301 must be fashioned "from the policy of our national labor laws." *Id.* at 456. Furthermore, this Court has held that the subject matter of Section 301 is "peculiarly one that calls for uniform law." *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 at 103 (1962). In *Howard Johnson Co. v. Detroit Joint Board*, 417 U.S. 249 (1974), this Court specifically rejected the proposition that basic federal labor policy formulated in unfair labor practice cases can be ignored in Section 301 litigation.

In *Howard Johnson* the union sought to compel a successor employer to arbitrate pursuant to a collective bargaining agreement with a predecessor employer. This Court had earlier held in an unfair labor practice context that a successor employer was not obligated to adhere to the terms of the predecessor's collective bargaining agreement. This Court then rejected the union's claim that a contrary result should be permitted under Section 301 of the Act:

> It would be plainly inconsistent with this view to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in a suit under § 301, and thus to permit the rights enjoyed by the new employer in a successorship context to depend upon the forum in which the Union presses its claims. *Howard Johnson*, 417 U.S. at 256.

This Court emphasized that the union's "effort to circumvent [this Court's prior decision] by asserting its claims in a § 301 suit to compel arbitration rather than in an unfair labor practice context cannot be permitted." *Id.* at 262.

National labor policy can now be ignored in three circuits, and, as this Court has stated, this cannot be permitted.

THE CONFLICTING DECISIONS OF THE CIRCUITS NEED TO BE RESOLVED BY THIS COURT.

The four conflicting decisions of the Courts of Appeals for the Fifth, Eighth, Ninth and Tenth Circuits are indicative of the quilt-like pattern of legal opinions which has developed in the federal courts since this Court's *Higdon* decision. The wide divergence of the circuits on this issue unfortunately establishes that this quagmire is thickening rather than dissipating as the Courts of Appeals pass on the issue. A speedy resolution of the underlying issues by this Court is necessary.

The Fifth Circuit is the only Court of Appeals which has adopted the Board's position that enforceability is contingent on a showing of majority status by the union. *Baton Rouge Bldg. & Const. v. E.C. Schafer Construction*, 657 F.2d 806 (1981). This is because the Fifth Circuit is the *only* circuit to analyze the issue as one of employee free choice. The Fifth Circuit, in rejecting the application of different policies for Section 301 litigation and unfair labor practice litigation, stated:

> But this distinction makes no difference. If the goal is the maintenance and insurance of *employee* free choice, it matters not whether the sword dangling above the employer's head is an unfair labor practice charge or a breach of contract suit. The direction of the pressure is the same — toward treatment of a nonmajority union as the employee's agent for collective bargaining. *E.C. Schafer*, 657 F.2d at 813.

The Eighth Circuit in *Contractors, etc. v. Associated Wrecking Co.*, 638 F.2d 1128 (1981) concluded that the absence of majority status did not preclude enforcement of prehire agreements. Contrary to the Fifth Circuit, the *Associated Wrecking* Court held that different principles apply in Section 301 as opposed to unfair labor practice litigation:

> To say that an employer may challenge the majority status of a union in an unfair labor practice proceeding is not to say that the employer may assert the union's lack of majority status as a defense in a breach of contract action on a type of contract specifically authorized by the Act. *Associated Wrecking*, 638 F.2d at 1133.

The Tenth Circuit, in *New Mexico Dist. Council, etc. v. Mayhew Co.*, 664 F.2d 215, at 219 (1981), specifically adopted the Eighth Circuit's view on this issue. In adopting these conflicting standards for Section 301 and unfair labor practice cases, neither Court dealt with or distinguished this Court's decision in *Howard Johnson*.

The Court below did not comment upon this particular split between the other circuits or upon the issue itself. The Court actually did not acknowledge that the Board treats prehire agreements as totally unenforceable until the union establishes majority status. The Court stated only that "[s]ome language [in the Board cases] supports this view."

Also, the Eighth and Tenth Circuits held that this Court, in its *Higdon* decision, "did not purport to decide the enforceability of all Section 8(f) agreements but only those which implicated the provisions of Section 8(b)(7)(c)." *Associated Wrecking*, 638 F.2d at 1133; *Mayhew*, 664 F.2d at 219. The Fifth Circuit obviously disagreed with this analysis since it applied the *Higdon* decision to Section 301 litigation. The Court below also did not agree with the Eighth and Tenth Circuits on this issue. The Court below

held that the *Higdon* decision was "written much more broadly than that view allows." The Court below stated that it formulated its decision based on a matter of policy and as a "matter of interpretation" of this Court's *Higdon* decision.

Although the decision of the Court below is not clear, it appears that the Court below and the Fifth Circuit find this Court's *Higdon* decision to be applicable to Section 301 litigation — they just disagree as to the proper interpretation to be applied. The Eighth and Tenth Circuits, however, find that this Court's decision is not applicable to Section 301 litigation at all and that this Court's decision should be confined to unfair labor practice litigation before the Board.

Hence, the Courts of Appeals have applied three different analyses to these issues which have resulted in three totally different results.

A fourth analysis which causes yet another result has been adopted by a federal district court and has been argued before the Courts of Appeals. In *Pension Fund v. Southern Stress Wire Corp.*, 509 F.Supp. 1097 (1981), the District Court for the Northern District of Georgia held that defenses that an employer could raise against a union could not be raised against trustees as third party beneficiaries. This analysis is based on this Court's decision in *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), where this Court held that an employer could not assert a union's breach of contract as a defense in a suit on the contract by the trustees.[9]

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[9]The Eighth Circuit specifically declined to pass on this issue since it held minority prehire agreements to be enforceable in all circumstances in Section 301 litigation. *Associated Wrecking*, at 1120. The Fifth Circuit rejected the argument, *E.C. Schafer*, 657 F.2d at 813, and the Court below has not adopted it.

The Court below actually included the Courts of Appeals for the Eighth and Tenth Circuits in this category. However, the Eighth Circuit specifically declined to pass on this issue and the Tenth Circuit case of *Mayhew* did not even involve the trust fund.

This analysis creates a fourth possibility where only the fringe benefit provisions of minority prehire agreements are enforceable and only through suits by the trustees.

These conflicting analyses and results adversely affect this nation's need for a uniform national labor policy. The decisions of the Courts of Appeals which have passed on these issues provide confusion rather than guidance to those courts which have yet to reach their decisions. This growing problem can only be resolved by a speedy resolution of the issues by this Court.

CONCLUSION.

For the reasons set forth above, a Writ of Certiorari should be issued by this Court to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this matter.

Los Angeles, California.

Dated: May 5, 1982.

Respectfully submitted,

JAMES T. WINKLER,
STEVEN D. ATKINSON,
Attorneys for Petitioner.

APPENDIX A.

FRANK L. TODD, et al., Plaintiffs-Appellees, v. JIM McNEFF, INC., a California corporation, Defendant-Appellant. No. 80-5214.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Oct. 8, 1981. Decided Feb. 8, 1982.

Trustees brought action to recover fringe benefit contributions owed by employer. The United States District Court for the Central District of California, Irving Hill, J., granted relief, and employer appealed. The Court of Appeals, Nielsen, District Judge for the Southern District of California, sitting by designation, held that: (1) prehire agreements are enforceable until repudiated by the employer; (2) employer's failure to perform contractual obligations did not amount to a repudiation; and (3) issue of coercion in the prehire agreement must be raised by repudiation and cannot be raised once an action to enforce has been brought.

Affirmed.

Appeal from the United States District Court for the Central District of California.

Before TANG and BOOCHEVER, Circuit Judges, and NIELSEN,* District Judge.

NIELSEN, District Judge:

This case arises under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Trustees of certain trust funds created pursuant to 29 U.S.C. § 186(c), filed this action to recover fringe benefit contributions allegedly due and owing by the terms of a collective bargaining agreement. The following facts are uncontroverted in the record.

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*Honorable Leland C. Nielsen, United States District Judge for the Southern District of California, sitting by designation.

On September 13, 1978, Jim McNeff, Inc. (McNeff, Inc.) was employed as a subcontractor on a jobsite. Jim McNeff, President of McNeff, Inc. was approached by a union representative who informed him that he would have to sign the Master Labor Agreement for the Union (International Union of Operating Engineers, Local No. 12) or leave the job. When Jim McNeff refused, the representative left and returned with the prime contractor, who also informed McNeff that he would have to sign the Agreement if he wanted to continue on the site. McNeff then signed the Agreement, although he claims he has never read it, nor did he ever intend to abide by its terms. At that time, McNeff, Inc. employed three workers. All signed union representative cards the same day.

According to the terms of the Agreement, McNeff, Inc. was required to make contributions to the trust fund for each covered employee. Each month from October, 1978, through March, 1979, McNeff, Inc. submitted to appellees a report stating that "no members of this craft were employed during the month," and remitting no contributions. In November, 1978, trustees asked permission to audit the company's records. After several postponements due to appellant's requests, on April 4, 1979, this action was filed. When the audit was carried out, the trustees found that covered employees had in fact been employed, and that contributions in the amount of $5,316.79 were due under the terms of the contract for five employees that had been employed prior to the filing of the suit.

The trustees also filed unfair labor practice charges with the N.L.R.B. The General Counsel declined to prosecute the case on the ground that a full collective bargaining relationship had never been established.

In the District Court, the Court granted summary judgment for the trustees, and McNeff, Inc. has appealed.

The labor contract in this case is one under Section 8(f) of the National Labor Relations Act (29 U.S.C. § 158[f]). This section is an exception to the general labor policy that an employer can only enter into a collective bargaining relationship with a union that represents a majority of the employer's employees. As jobs begin and end, construction workers frequently change employers. Due to this, Congress has seen fit to allow so-called "prehire" agreements in that industry. These agreements may be signed before the union represents a majority of the employer's employees, and may continue in duration through more than one of the employer's jobs, even if the employer goes through a high employee turnover. These agreements allow the employees some of the wage and benefit advantages of union representation, as well as relative wage stability. The employer is assured a qualified pool of workers to choose from when it needs them, protection against labor unrest during the period of the contract, and predictable labor costs, an invaluable tool in the bidding process.

The major issue in this case is the enforceability of these pre-hire agreements. Although these agreements are legal by virtue of § 8(f), they do not mature into full collective bargaining agreements until the union has actually succeeded in convincing a majority of the employer's employees to be represented by the union. *Ruttman Construction Company*, 191 N.L.R.B. 701, 702 (1971). The Supreme Court approved this position in *N.L.R.B. v. Local Union No. 103, Iron Workers (Higdon Construction Company)*, 434 U.S. 335, 345, 98 S.Ct. 651, 657, 54 L.Ed. 586 (1978). In *Higdon*, the employer refused to abide by the terms of a pre-hire agreement on one of its jobs, and the union picketed the jobsite for more than 30 days. The employer filed unfair labor practice charges with the N.L.R.B. under § 8(b)(7)(C) of the N.L.R.A., which forbids picketing by

a union which is not the authorized bargaining representative unless the union petitions the Board for a representation election within 30 days. The Supreme Court reversed the Circuit Court and reinstated the N.L.R.B. decision that the picketing was in fact an unfair labor practice. The Court held that a § 8(f) pre-hire agreement is only a preliminary step in the creation of a collective bargaining relationship, and that the relationship only matures at such time as the union achieves majority status. Until then, the contract is voidable. 434 U.S. at 341, 98 S.Ct. at 655. Since the *Higdon* decision, the lower federal courts have split into three groups on the issue of what is the correct interpretation of the Supreme Court's statement that these contracts are voidable.

The most restrictive reading of *Higdon* is that it was only intended to deal with the interface between § 8(f) and § 8(b)(7). Under this view, *Higdon* is only applicable to unfair labor practice cases, and in cases such as this one, brought by trustees of fringe benefit funds for back payments, § 8(f) agreements are fully enforceable under all circumstances. Heavy reliance is placed upon *Lewis v. Benedict Coal Corporation*, 361 U.S. 459, 80 S.Ct. 489, 41 L.Ed.2d 442 (1960) by the courts that have adopted this approach. In *Benedict*, the Supreme Court held that a contract to pay contributions to a union pension fund was not a typical third-party beneficiary contract, in that the employer could not assert the union's breach of contract as a defense in an action by the trustees. The courts which have interpreted *Higdon* in this narrow manner do so by analogy to *Benedict*, limiting in another way the employer's right to challenge the enforceability of an agreement to make fringe-benefit contributions on a suit by the trustees.

The following courts have adopted this reasoning: The Eighth Circuit, *Contractors, Laborers, Teamsters and Engineers Health & Welfare Plan v. Associated Wrecking Co.*,

638 F.2d 1128 (8 Cir. 1981); the Tenth Circuit, *New Mexico District Council of Carpenters v. The Mayhew Co.*, 664 F.2d 215 (10 Cir. 1981); the Eastern District of Virginia, *Eastern District Council of Carpenters v. Blake Construction Co.*, 457 F.Supp. 825 (1978); and the State of Washington Court of Appeals, *Western Washington Cement Masons Health & Security Trust Funds v. Hillis Homes*, 26 Wash.App. 224, 612 P.2d 436 (1980).

The middle position relies upon the use of the word "voidable" in the *Higdon* opinion. According to this interpretation, an employer is able to exercise the right of repudiation until the union achieves majority status. A prehire agreement would therefore be fully enforceable until a repudiation, and trustees could recover in a § 301 action contributions accruing prior to the repudiation.

The Eighth Circuit apparently reconsidered the restrictive position taken in *Associated Wrecking*, and adopted this approach in *W.C. James, Inc. v. Oil, Chemical* and *Atomic Workers International Union*, 646 F.2d 1292 (8 Cir. 1981). The Middle District of Florida also espouses this view. *Florida Marble Polishers Health & Welfare Trust Fund v. Megahee*, 102 L.R.R.M. 2740 (1979).

In addition, two other courts, while rejecting the third interpretation, have found it unnecessary to choose between these first two. *Trustees of the Atlanta Iron Workers Local 387 Pension Fund v. Southern Stress Wire Co.*, 509 F.Supp. 1097 (N.D. Ga. 1981); *Western Washington Laborers-Employers Health & Security Trust Fund v. Newman*, 90 C.C.H. Labor Cases ¶ 12,379 (W.D. Wash. 1980).

The final view that some courts have taken on this question is that until the union affirmatively demonstrates majority status no contract has been formed, and a repudiation voids the contract *ab initio*. Some language in *Ruttman*,

supra, and the N.L.R.B. *Higdon* decision (*Iron Workers Local 103* [*Hidgon Construction Co.*], 88 L.R.R.M. 1067 [1975]) supports this view.

The courts which have taken this stance are a different judge in the Western District of Washington, *Western Washington Laborers-Employers Health & Security Trust Fund v. McDowell*, 103 L.R.R.M. 2219 (1979); the District of Oregon, *Vermeer v. Aloha Contractors*, 90 C.C.H. Labor Cases ¶ 12,466 (1980); and the District of the District of Columbia, *Washington Area Carpenters Welfare Fund v. Overhead Door Co.*, 488 F.Supp. 816 (1980).

The Fifth Circuit also refused to enforce a pre-hire agreement prior to a demonstration of majority support. *Baton Rouge Building and Construction Trades Council v. E. C. Shafer Construction Co.*, 657 F.2d 806 (5 Cir. 1981).

We hold that the middle ground, requiring repudiation by the employer in order to avoid the pre-hire agreement, is both the best interpretation of *Higdon* and the best implementation of the national labor policies. There is no reason to restrict the statements in *Higdon* about § 8(f) agreements generally to unfair labor practice cases. The opinion is written much more broadly than that view allows. Moreover, the N.L.R.B. *Higdon* opinion is written even more broadly, and the Supreme Court's stated reason for reinstating the N.L.R.B. opinion was that the courts should defer to the Board when it has made an acceptable reading of the statutory language. 434 U.S. at 341, 98 S.Ct. at 655.

By the same token, it goes too far to hold these contracts unenforceable without a repudiation. The Supreme Court used the word "voidable", not "void" in *Higdon*. 434 U.S. at 341, 98 S.Ct. at 655. At least some members of Congress have criticized *Overhead Door*, *McDowell*, and this interpretation generally. 126 Cong.Rec. H7899 (August

26, 1980) (remarks of Rep. Thompson). To hold that no contract has been formed also allows employers to enjoy the benefits of a pre-hire agreement, then later repudiate and completely avoid their own contractual obligations.

On the other hand, allowing a repudiation by the employer, but enforcing the contract until that repudiation occurs seems a correct reading of *Higdon*. A minority union will not be able to control an employment situation, because an employer can repudiate. Employers will be prevented from misleading unions into believing they intend to perform their contractual duties. Thus pre-hire agreements will be available to fill the void in the construction industry without allowing minority unions inappropriate leverage in this collective bargaining context.

On the balance, therefore, both from a policy standpoint and as a matter of interpretation of the Supreme Court's mandate, we find that § 8(f) pre-hire contracts are voidable by the employer until the union attains majority support. Until such a repudiation, however, the contract is fully enforceable in action under § 301 of the L.M.R.A.

McNeff, Inc. has argued that this holding creates a conflict in the law, since it will require the District Courts to make determinations regarding the majority status of a union at different times once it has made the finding that there has been a repudiation. It cites *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers (Peter Kiewit)*, 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976) for the proposition that these determinations are solely the province of the N.L.R.B. *Peter Kiewit* is, however, not controlling here. The Board has expertise in determining the majority status of a union at any given time. It has no apparatus for determining a union's past status. If there has been a repudiation, the crucial question is whether the union had previously attained majority status.

Re-creation of past relationships for the purpose of resolving factual disputes is one of the traditional functions of a trial court, and not a process in which the N.L.R.B. has any extraordinary expertise. Therefore, in this opinion we do not extend the District Court's jurisdiction into an area in which the N.L.R.B. exercises exclusive authority.

We need not resolve this issue, however, because it is clear that in this case the employer never repudiated the contract. The only act in the record which could possibly be argued to be a repudiation is the employer's failure to perform its contractual obligations. While it is clear that in some circumstances noncompliance can be so bald as to put the union on notice of the employer's intent to repudiate (*see*, e.g. *Higdon*, 88 L.R.R.M. 1067), the behavior here falls short. It is precisely this sort of action by an employer, enjoying the benefits of a pre-hire agreement and misleading the union as to the employer's intention of never performing its obligations, which has led us to adopt this view of the voidability of these contracts. There has been no repudiation, and this contract was enforceable for the period covered by the complaint.

McNeff, Inc. finally argues that there was no contract since it was coerced into signing the Master Labor Agreement. Appellant cites *Higdon*, 434 U.S. at 348, n. 10, 98 S.Ct. at 659, for the proposition that only pre-hire agreements which have been voluntarily entered into can be enforced. We need not decide here whether the union's tactics amounted to coercion, because the employer has raised this issue in the wrong way. The employer's remedy in the case of a coerced pre-hire agreement is the same as that for a minority union agreement. It must repudiate. To allow the employer to raise the issue of coercion now would be to do what we have just refused to do — allow the employer to enjoy the fruits of a pre-hire agreement and then challenge

it. Thus, if a § 8(f) agreement has been signed under coercion, it is still enforceable up to the time it is repudiated.

By the above analysis, the contract was fully enforceable up to the time the suit was filed. McNeff, Inc. must fulfill its contractual obligations, and the District Court's grant of summary judgment for the trustees is AFFIRMED.

APPENDIX B.
Summary Judgment.

United States District Court, Central District of California.

Frank L. Todd, et al., Plaintiffs, v. Jim Mc Neff, Inc., et al., Defendants. No. CV 79-1527-IH.

Filed: February 8, 1980.

There came before the Court for hearing on February 4, 1980, Plaintiff's Motion for Summary Judgment filed January 14, 1980, and Defendant's Motion for Summary Judgment filed January 21, 1980. Appearances were: For Plaintiffs Frank L. Todd, et al., Trustees of the Operating Engineers Health and Welfare Fund, Operating Engineers Pension Trust, Operating Engineers Vacation-Holiday Savings Trust, and Operating Engineers Training Trust, Wayne Jett, Lawyers, by Christopher M. Laquer, Esq.; for Defendants, Steven D. Atkinson, Esq.

The Court having considered the said Motions together with the Evidence, Points and Authorities, and other documents filed in support thereof and in opposition thereto, and having heard argument, finds there is no bona fide dispute of material fact. Defendant has not shown entitlement to judgment as a matter of law, and on that ground, the Court denies Defendant's Motion for Summary Judgment. The Court finds that Plaintiff has shown entitlement to judgment as a matter of law, and it is ORDERED that Plaintiff's Motion for Summary Judgment be granted. A transcript of the proceedings in open court on February 4, 1980, is ORDERED filed when produced, which transcript shall constitute the Court's Findings of Fact and Conclusions of Law.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Frank L. Todd, et al., as Trustees of the Operating Engineers Health and Welfare Fund, Operating Engineers Pension Trust, Operating Engineers Vacation-Holiday Savings Trust, and Operating Engineers Training Trust, shall have judgment against Defendant Jim Mc Neff, Inc., in the sum of $7,119.29, plus costs of suit in the sum of $_____ Said sum includes $1,802.50 as reasonable attorneys fees.

2. The Clerk shall transmit by U.S. mail copies of this Judgment to counsel for all parties.

DATED: February 8, 1980.

/s/ Irving Hill,
IRVING HILL, Judge
United States District Court

APPENDIX C.

Reporter's Transcript of Proceedings.

In the United States District Court, Central District of California.

Honorable Irving Hill, Judge Presiding.

Frank L. Todd, et al., Plaintiffs, vs. Jim McNeff, Inc., et al., Defendants. Case No. CV 79-1527-IH.

Los Angeles, California; Monday, February 4, 1980; 10:00 A.M.

* * *

(Other court matters.)

THE CLERK: Item No. 5, CV 79-1527-IH, Frank L. Todd, et al., v. Jim McNeff, Inc., et al.

Counsel, will you announce your appearances, please.

MR. LAQUER: Your Honor, Christopher M. Laquer for the plaintiffs. With me is Brian Hodge, an attorney in our office.

THE COURT: All right.

MR. ATKINSON: For defendants Steven D. Atkinson.

THE COURT: Have seats, please, gentlemen.

What we have before us today is reciprocal motions for summary judgment. Again following the usual practice, I want to list the evidence. The evidence consists of the following:

For plaintiffs we have the declaration of Mr. Majich, who attaches the trust agreements and the union agreements. We also have the declaration of Mr. McClendon, the auditor for the trusts. And plaintiffs seek total summary judgment not only on the issue of liability but for a specific amount. The amount sought — other than attorneys fees, which are also sought — is $5,316.79.

I don't understand the defendant, if plaintiff is found entitled to judgment, as questioning that $5,316.79. I see no evidence to question it.

Plaintiff prays for attorneys fees in addition, and in the amount of $1,802.50. And, again, I see no evidence from defendant which would question the amount of attorneys fees if plaintiff is found entitled to them.

Now, have I correctly stated your position and the evidence that you have submitted?

MR. LAQUER: Yes, your Honor.

THE COURT: Okay. The evidence for the defendant consists of a declaration of Mr. McNeff, the principal of the defendant corporation.

Attached to your points and authorities, Mr. Atkinson, are a number of documents from the NLRB.

I have to tell you that from a strictly formal point of view that that is not evidence. You have to have an affidavit or a declaration from somebody that identifies these things. I can't take judicial notice of such documents. That is not a court of record. And they are not, as far as I know, public records of the type of which judicial notice may be taken.

So you ought to have them identified in a formal affidavit or declaration.

However, I don't understand them as being disputed by the plaintiff in this case, and I propose to consider them in evidence even though they are attached to your points and authorities.

Is that agreeable?

MR. LAQUER: Yes, sir.

THE COURT: All right. Now, have I omitted any of your evidence?

MR. ATKINSON: No, your Honor.

MR. LAQUER: Your Honor, if I might make one provision. I do not object to the Court considering those documents as for what they stand for. However, we do contend that they are irrelevant.

THE COURT: Oh, I understand that. I am talking about not objecting to the form in which they were tendered.

All right. Now, I think I ought to say also that the defendant made no formal reply to the plaintiff's motion, treating its own motion as being the reply to plaintiff's motion. And I will treat it the same way. And plaintiff's motion will likewise be deemed to be the reply to defendant's motion. Although plaintiff formally replied, whatever is not in that reply but is contained in its own motion will be deemed as opposition material to the defendant's motion.

Now, the facts of this situation appear to be uncontradicted in every material way. This is the picture as drawn by the defendant's own affidavit. This contract involves the construction industry which for labor law purposes is the subject of an exemption and has been given special treatment under the NLRB statute and procedures. The exemption is found in Section 8(f) of the Act and is called Pre-Hire Agreements. And taking defendant's evidence in a most favorable light to him, this is the factual picture that appears: The defendant was a subcontractor on a job in progress. The general contractor's representative came to him and said that the defendant had to sign a contract with the union or leave the job. And the defendant agreed to sign the contract.

Under the pre-hire exemption of the statute a contract does not become binding unless and until a majority of the defendant's employees sign union membership cards. But the facts are uncontradicted that a majority did sign after the defendant went to them and told them — this is the

picture in the defendant's own affidavit — that they had to join the union or they couldn't work.

The defendant completed the job with those employees. But the defendant never honored the contract at all. There were these NLRB proceedings, which defendant says create a collateral estoppel. And the defendant is also making the claim here that the NLRB has primary jurisdiction of the case.

Now, that's the case. My tentative view is to deny the defendant's motion and to grant the plaintiff's motion.

The legal arguments that the defendant makes are in my view incorrect. The doctrine of collateral estoppel is not available to the defendant. There has been no adjudication in a judicial or judicial-type proceeding which would give rise to collateral estoppel. All that has happened is that the general counsel of NLRB has decided not to go forward on the union's claim of an unfair labor practice. That kind of determination by a lawyer who is like a prosecutor and who determines not to go forward does not give rise to collateral estoppel; and defendant has brought no authority that says it does.

In dictum, in the general counsel's letter deciding not to go forward, the general counsel gives as his opinion that the contract was not binding. That also does not bind this Court and gives rise to no collateral estoppel.

On the claim advanced by defendant that the Board has primary jurisdiction, the defendant is also incorrect. It's well established that although defendant's failure to honor a contract of this sort may be the subject of an unfair labor practice claim before the Board, as it was in this case, it is also the subject, may also be the subject of district court litigation in a Section 301 suit; and that the district court when that happens has jurisdiction to entertain the claim.

Jurisdiction would exist, it seems to me, even if the Board was in the middle of hearing the dispute. But in that event, the Court would probably stay its own decision until the Board disposes of the claim through the adjudicative process. And then maybe there could even be collateral estoppel, because there would be live testimony and adjudicative process.

But we don't have any of that here. The Board never heard this dispute in the adjudicative process. And jurisdiction in this Court clearly exists, and there is no basis to stay or stop that jurisdiction.

In the Higdon case, the Supreme Court, though in dictum, in my view clearly contemplated district court jurisdiction in just this situation.

As to plaintiff's motion, I would grant it because I would find there is no bona fide dispute of material fact. I would find that even giving every reasonable intendment to the defendant's evidence, that plaintiff has shown entitlement to judgment.

It is undisputed that McNeff signed the contract. It's undisputed that his three employees, which constituted all or a majority of his work force at the time, signed union cards. Thus, the contract on its face is valid and binding. And the defendant seeks to avoid liability on it on the ground that he misled his own employees, that he coerced his own employees into signing those union cards. And I am just of the belief that it does not lie in the defendant's mouth to avoid the effect of the contract, the effect of those people signing their union cards.

The employees conceivably would have a right to avoid their signature of the cards. I don't express any opinion on that. But defendant doesn't have a right to do it for them when he is the one who misled them. There is case law that

a coerced majority is not a true majority. But that rule of law is handed down where either the parties coerced are asserting this claim or the parties harmed by the coercion are asserting the claim; such party being not the coercer. So I do not think the case law applies to these facts.

Now, I am going to hear from you, Mr. Atkinson, since you are the apparent losing party. But I would like to hear what happened to the election held within the last week or ten days, and whether either of you think that changes anything about the current lawsuit. I haven't seen any new papers asserting that it changes anything.

What about you, Mr. Laquer? What happened at the election? And does it change anything, in your opinion?

MR. LAQUER: Well, your Honor, my contention is that it does not change anything as to this lawsuit. Because, first of all, the lawsuit covers a period prior to the election. The election itself is apparently mired down in challenges and objections.

My understanding is that an election was held, certain people cast votes —

THE COURT: But you don't know the results.

MR. LAQUER: I have not been advised of the results. And certain of the results, ballots have been impounded by the Board and —

THE COURT: The Board has to go through it and finally tell us what the results are.

MR. LAQUER: Yes.

THE COURT: Okay.

Now, I am going to hear from you, Mr. Atkinson.

MR. ATKINSON: Thank you, your Honor.

I think you have a good understanding of the Act. The Act was meant to protect employees. And generally, they

entered into a contract, which was entered into between the union and Mr. McNeff, that would be unlawful, both on behalf of Mr. McNeff and the union. The 1959 exception of the law was passed, Section 8(f) which allowed contracts to be entered into, where they were entered into voluntarily, and if afterwards the union obtained majority status.

I think I disagree with the Court on several key issues here. As plaintiff indicated in its moving papers in response to mine, the Court would as a factual matter have to determine whether the contract was voluntarily entered into.

I do not believe McNeff's declaration establishes it was voluntarily entered into.

THE COURT: I don't follow you. He says that the general representative came over and said, "Either sign it or you have to leave the job."

MR. ATKINSON: Well, he was first approached by the union, who told him he had to sign or be kicked off the job. He was then approached by the superintendent, accompanied by the union representative, who reiterated that he either sign that contract, or he was being kicked off the job.

I would submit that "voluntariness" obviously is a word of art. But in labor relation's definition, that that is not construed to be voluntarily as envisioned when passage of the statute —

THE COURT: Well, where is the authority about that?

MR. ATKINSON: Your Honor, the authority about that, I would have to —

THE COURT: He signed it. He knew what he was signing. And if he decided that he wanted to stay on the job, and not defy the general, I don't see where that constitutes a coercion. Is there some authority that it might? I will look at it.

MR. ATKINSON: Your Honor, I think what you need to do is to review the legislative history of 8(f). You will determine, I believe, upon reviewing it that 8(f) was passed with one specific situation in mind. For example, if I were from Georgia, which I am, and we were going to build a power plant in California, I would not have a work crew. I would not be able to go to this union and obtain employees unless prior to obtaining those employees I signed a contract. Normally, that would be illegal. However, in the construction industry, to obviate this problem whereby you needed to obtain skilled employees and could not obtain them unless you had a contract, that you could sign that contract if you went to the union voluntarily and said, "I want to hire union operators. I am going to sign this contract, and you send me the union operators."

That is a factual situation for which this exception was passed. And I would submit that that factual situation does not exist here. Instead, this employer did not want — he already had a crew of employees. He did not want to sign that union contract. However, because of the financial position he found himself in, he did not believe that he could afford to be kicked off that job.

THE COURT: That is not in his affidavit, either.

MR. ATKINSON: Well, I realize it's not, your Honor. Perhaps the affidavit is inartfully drawn.

THE COURT: That's all the evidence I have.

MR. ATKINSON: Perhaps then as the plaintiff has stated in its response, responding memorandum, that that issue is still a question of fact and should be set for hearing, as to the voluntariness.

THE COURT: Plaintiff has conceded that?

MR. ATKINSON: I believe they did, your Honor, in their reply memorandum.

THE COURT: And that they are not entitled to a summary judgment motion? I don't remember such a concession. If you are through, we will find out.

MR. ATKINSON: I have some other points that I would like to cover, if I may, your Honor.

THE COURT: Well, let's find out now, though. Have you made such a concession?

MR. LAQUER: No, your Honor.

THE COURT: Very well.

Go ahead, Mr. Atkins. What did you have in mind? Do you want to show me where that concession is supposed to have occurred?

MR. ATKINS: Well, no, your Honor. I was going to refer to his memorandum here in which I believe he stated three factual issues needed to be decided by the Court.

THE COURT: Well, you will have to show me what you have in mind as a concession by the plaintiff. What document are you going to be looking at?

MR. ATKINSON: I am referring to the document that was filed, I believe, January 27th, or so, your Honor.

THE COURT: Hold on. Is that in his reply?

MR. ATKINSON: Yes, your Honor.

THE COURT: That's filed January 24th. What page?

MR. ATKINSON: Page 7, your Honor.

(Court reading.)

THE COURT: I will have Mr. Laquer explain what is going on with this argument when his turn comes. Go ahead.

MR. ATKINSON: Thank you, your Honor.

Your Honor has also determined that the union did represent a majority. I would submit that the Court —

THE COURT: That is uncontested, isn't it, —

MR. ATKINSON: No, it is not, your Honor.

THE COURT: — that three cards were signed, and at most there were five. Isn't that right?

MR. ATKINSON: No, your Honor, it's not.

Let me explain, if I may, the concept of majority status that is envisioned in the National Labor Relations Act.

Majority status to be determined must first determine what the appropriate collective bargaining unit is.

THE COURT: Wait. Before you tell me the law, tell me the facts. The facts here are undisputed that three employees signed. Isn't that true?

MR. ATKINSON: That is true.

THE COURT: At that time there is some unclearness, but at most there were five.

MR. ATKINSON: At that time I believe there were only three, your Honor.

THE COURT: Okay.

MR. ATKINSON: Your Honor, however, those were not all the eligible employees which had a right to vote, and whether or not the union was a majority representative —

THE COURT: Where is that in the evidence?

MR. ATKINSON: That is not in the evidence anywhere.

THE COURT: Then I can't consider it. Proceed.

MR. ATKINSON: Well, your Honor, if I may just explain the election procedure —

THE COURT: It becomes irrelevant, doesn't it? We have three, which are all three at that time signing. That's the evidence. Is there anything else you want me to look at factwise?

MR. ATKINSON: Yes, your Honor, there is.

THE COURT: What is it? And where is it in the evidence?

MR. ATKINSON: It is not submitted in the evidence, your Honor.

THE COURT: Then I can't look at it. End of discussion.

MR. ATKINSON: Well, your Honor, all I would point out to the Court —

THE COURT: Don't you understand that a summary judgment motion is decided on evidence?

MR. ATKINSON: I understand completely that it is decided on evidence, your Honor. And I obviously have not artfully put the summary judgment motion together. However, I did rely to some extent on the Peter Kiewit decision, which holds by the Supreme Court that federal courts have no authority to make a determination on what is the appropriate bargaining unit. And I also believe, based on that decision, and the Ninth Circuit's decision in Waggoner, that the Court has no authority to determine majority status. That is left solely to the Board's expertise, determining which employees should be allowed to vote, and what the criteria for eligible voters should be. And just because three people at one point in time were in fact union members, does not, as far as the National Labor Relations Board is concerned, establish majority representation.

There are many other factors which must be determined before you can make a determination as to whether or not a group of employees is in fact represented by the union.

THE COURT: I just don't agree with you. If the jurisdiction exists under 301, then the Court has to have the right to determine factually whether the contract came into being, namely, whether it was signed by a majority.

Go ahead.

MR. ATKINSON: Well, your Honor, I think those two decisions are the key to my argument, Peter Kiewit and Waggoner, wherein I agree with the Court — the Court under 301 has the ability, indeed it must determine what provisions of the contract mean. However, I would assert

that the determination of the validity of this contract must turn on two issues. The first issue is —

THE COURT: You seem to be arguing the exclusive jurisdiction issue now. Right?

MR. ATKINSON: Well, your Honor, first you must determine what the appropriate collective bargaining unit is. Then you must determine whether or not in fact the union was a majority representative. And I do not believe that the Court under Peter Kiewit is empowered to make those determinations. I believe they are solely within the province of the Board, at least as far as primary jurisdiction is concerned.

I would also point out that the NLRB looked into this matter and found obviously that there was not a contract valid under —

THE COURT: I don't agree with you. The general counsel in dictum in a decision in which he says I am not going to proceed, said what it looked like to him. That is not a finding of the NLRB.

MR. ATKINSON: I agree with your Honor. There has been no finding by the NLRB. However, the NLRB —

THE COURT: The NLRB isn't a court. There has been no finding by the Board.

MR. ATKINSON: Excuse me, your Honor. I apologize. There has been no finding by the Board.

THE COURT: Okay. Why do you keep on saying there was one?

MR. ATKINSON: I am sorry, your Honor. I must be nervous. However, the NLRB did determine that there was no contract bar to the election, and did decide to hold an election to determine whether or not McNeff's employees desired to be represented by the union. The result of that election was three employees voted against the union and

one employee voted for the union. There were three other employees who attempted to cast ballots, one of whom had worked for McNeff in '78 and —

THE COURT: Well, that is not before me. I am sorry. That is not before me at all.

MR. ATKINSON: Well, your Honor had asked what the results of the election were.

THE COURT: Okay. And I take it you are not dissenting — maybe I should not have asked it because it is irrelevant to my task today. But I take it that you don't dissent from what Mr. Laquer said, which is that, well, we don't know the result of the election yet. The Board has to —

MR. ATKINSON: I would agree with Mr. Laquer. There has not been a final —

THE COURT: Let's stop it right there.

I want to hear from the other side now.

MR. ATKINSON: Thank you, your Honor.

Mr. LAQUER: The Court has asked me to reply to what my reply means?

THE COURT: Yes. What is that all about? It's rather difficult for you to say, "For my motion there isn't any dispute of fact; but for his motion there is." It's a little inconsistent.

MR. LAQUER: It's slightly inconsistent, your Honor. It's based on my examination of the declarations by Mr. McNeff and my reading of those declarations, and attempting to interpret the facts from those declarations.

My interpretation was, as I said at the end of that section, that we didn't believe that there was any disputed question of fact. However, if the Court read those declarations differently —

THE COURT: You see, I find it very, very difficult strategy and litigation posture to do what you did. You say for the purposes of your own motion that on these very factual issues there is no bona fide dispute of material fact. Isn't that what you are saying?

MR. LAQUER: Yes, I do.

THE COURT: And then you say, "That's for my motion. But for his motion, I take a different view. There is a bona fide dispute of material fact."

And the facts that are involved, the questions are the same, aren't they?

MR. LAQUER: Yes, they are.

THE COURT: Then you will have to tell me how in a pleading — in a pleading — one can take inconsistent positions. Because one doesn't yet know what the facts are going to turn out to be.

In a motion for summary judgment, with a factual record right in front of you, and especially in your reply, so you know all the facts, how do you take an inconsistent position?

MR. LAQUER: Well, your Honor, I didn't believe that it was inconsistent at the time I prepared the reply. The reason why I prepared the reply was if the Court believed Mr. McNeff's declaration or interpreted it to mean that he didn't voluntarily sign what he said he signed, then that would be a material question of fact.

I didn't believe it was. And that is why I said determines — I thought I put a proviso on this in the beginning and in the end of that section to alert the Court that that was not —

THE COURT: Now, let's be very candid. Do you know any authority that would indicate that on these facts that might be called coercion of a type that would void the

contract, this business about the union representative? If it does, then we will have to have a trial on the issue.

MR. LAQUER: I do not.

THE COURT: It may be operating under some misapprehension, but was it not the general's prerogative, general contractor, to say, "I want this to be a union job," —

MR. LAQUER: Yes, it is.

THE COURT: — "and if you don't go along with the union and sign this contract, I am sorry, I can't use you."

MR. LAQUER: It is.

THE COURT: Is that not what happened, on his own evidence?

MR. LAQUER: Yes. That is what happened.

THE COURT: And isn't it clear that that does not constitute coercion of a type that would permit avoidance of the contract?

MR. LAQUER: Yes, sir.

THE COURT: That's the way it appeared to me. And I am going to disregard as surplusage this business at the end of your memorandum. But I urge you in the future to give some very careful analytical thought to what your last paper may look like in comparison with and put in juxtaposition of your prior papers.

You understand that.

MR. LAQUER: Yes, I understand it, your Honor.

MR. ATKINSON: Your Honor, if I may make one further comment.

THE COURT: No. No further discussion is indicated.

MR. ATKINSON: I just wanted to address the Court on the issue of voluntariness.

THE COURT: No further discussion is indicated.

I find that there is no bona fide dispute of materiál fact. I find that plaintiff has shown entitlement to judgment. I grant plaintiff's judgment as prayed in the amounts prayed, including the attorneys fees.

Defendant's motion for summary judgment is denied. The defendant has not shown entitlement to judgment as a matter of law.

I am ordering — or, I want to order, please, Mr. Laquer, a transcript, which will constitute my findings and conclusions —

MR. LAQUER: I will so order, your Honor.

THE COURT: — and an explanation of my reasoning. And we will prepare the judgment.

Now, we haven't heard from the other counsel yet, Mr. Clerk. So we will take a recess until we hear from them. Maybe you can round them up.

(Short recess.)

* * *

CERTIFICATE.

In the United States District Court, Central District of California.

Frank L. Todd, et al., Plaintiffs, vs. Jim McNeff, Inc., et al., Defendants. No. CV 79-1527-IH.

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Central District of California.

I further certify that the foregoing 22 pages are a true and correct transcript of the proceedings had in the above-entitled cause on Monday, February 4, 1980, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 19th day of March, 1980.

/s/ Don P. Cram
Official Reporter

APPENDIX D.

[Letterhead]

July 10, 1979

Julius Reich, Esq.
Reich, Adell, Crost & Perry
501 Shatto Place, Suite 100
Los Angeles, CA 90020

Re: Jim McNeff, Inc.; Jim McNeff
Trucking and Equipment Rental,
joint employer
Case 21-CA-17870

Dear Mr. Reich:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it does not appear that further proceedings on the charge are warranted. There is insufficient evidence to establish that the Employer violated Section 8(a)(5) and (1) of the Act. While the parties may have executed an agreement arguably within the meaning of Section 8(f) of the Act, in September 1978, it does not appear that a full Section 9(a) collective-bargaining relationship has been established. In this regard, the contract is less than 1 year old and it appears that the Employer repudiated the contract from its inception. Additionally, the signing of the agreement and the Employer's subsequent instructions to his employees to join the Union appear to have been merely surface gestures to satisfy the Union and to protect the Employer's position on a then on-going construction project and did not signify the Employer's intent of entering into a collective-bargaining relationship. I am, therefore, refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D. C. 20570, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D. C., by the close of business on July 23, 1979. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washington, and a copy of any such request should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

/s/ Wilford W. Johansen
Wilford W. Johansen
Regional Director

Enclosures
CERTIFIED MAIL
RETURN RECEIPT REQUESTED
cc: (See attached sheet.)
cc: General Counsel
National Labor Relations Board
Washington, D. C. 20570

Local No. 12, International Union
of Operating Engineers, AFL-CIO
3055 Wilshire Boulevard
Los Angeles, CA 90010

Jim McNeff, Inc.; Jim McNeff
Trucking and Equipment Rental,
joint employer
94-241 National Avenue
Mecca, CA 92254

Steven D. Atkinson, Esq.
1300 Dove Street, 2nd Floor
Newport Beach, CA 92660

APPENDIX E.

[Letterhead]

November 8, 1979

Re: Jim McNeff, Inc.; Jim McNeff
Trucking and Equipment Rental,
Joint Employer
Case No. 21-CA-17870

Ralph M. Phillips, Esquire
Reich, Adell, Crost and Perry
501 Shatto Place, Suite 100
Los Angeles, California 90020

Dear Mr. Phillips:

Your appeal from the Regional Director's refusal to issue complaint in the captioned case has been duly considered.

The appeal is denied. Under all the circumstances, including the evidence that the Employer was forced by the general contractor to sign the 8(f) agreement after union agents appeared on the job site; that the Employer required the employees to join the Union; that the Employer repudiated the 8(f) agreement immediately after signing it, and never implemented any of its terms; and that the Union did not object to the Employer's repudiation until June 1979, it was concluded that the burden of establishing that the Employer had violated Section 8(a)(5) and (1) by refusing to apply the 8(f) agreement could not be sustained.

Very truly yours,

Norton J. Come
Acting General Counsel
By /s/ Mary M. Shanklin
Mary M. Shanklin
Acting Director
Office of Appeals

cc: (See next page)

Re: Case No. 21-CA-17870

cc: Director, Region 21

Local No. 12, Int'l union of Operating Enginers, AFL-CIO, 3055 Wilshire Blvd., Los Angeles, California 90010

Jim McNeff, Inc.; Jim McNeff Trucking and Equipment Rental, joint employer, 94-241 National Avenue, Mecca, California 92254

Steven D. Atkinson, Esquire, 1300 Dove St., Second Floor, Newport Beach, CA 92660

APPENDIX F.
Supplemental Decision and Certification of Results of Election.

United States of America Before the National Labor Relations Board.

Jim McNeff, Inc. Employer-Petitioner and International Union of Operating Engineers, Local No. 12, AFL-CIO Union. Case 21-RM-1967.

Mecca, Calif.

On August 22, 1980, the National Labor Relations Board issued a Decision and Order in the above entitled proceeding in which the Board, *inter alia*, ordered that a hearing be held to resolve the issues raised by the Union's objection.

Pursuant thereto a hearing was held and, on October 27, 1980, the Hearing Officer issued and served on the parties her Report and Recommendations. In her report, the Hearing Officer recommended to the Board that the Union's objection be overruled in its entirety and that a certification or results be issued.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with this proceeding to a three-member panel.

No exceptions to the Hearing Officer's report were filed by either party within the time provided therefor. We, therefore, adopt the Hearing Officer's recommendations as contained in her report. Accordingly, the Union's objection is hereby overruled in its entirety.

As the Union failed to receive a majority of the valid ballots cast, we shall certify the results of the election.[1]

---

[1]The tally of ballot shows that there were approximately 7 eligible voters and that 7 ballots were cast of which 1 was for the Union, 3 was against the Union and 3 were challenged. The challenged ballots are sufficient in number to affect the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

IT IS HEREBY CERTIFIED that a majority of the valid ballots has not been cast for International Union of Operating Engineers, Local No. 12, AFL-CIO, and that said labor organization is not the exclusive representative of all the employees, in the unit herein involved, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

Dated, Washington, D.C., November 17, 1980.

Howard Jenkins, Jr., Member
John A. Penello, Member
John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

Office - Supreme Court, U.S.
FILED
SEP 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2150

IN THE

Supreme Court of the United States

October Term, 1981

JIM MCNEFF, INC., a California corporation,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

JOINT APPENDIX.

JAMES T. WINKLER,*
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**Counsel of Record.*

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(213) 380-2082,
Counsel for Respondents.

PETITION FOR CERTIORARI FILED MAY 7, 1982
CERTIORARI GRANTED JULY 2, 1982

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Chronological List of Important Dates and Docket Entries.

1. April 26, 1979 — Frank L. Todd, et al. ("Trustees") file a breach of contract suit against Jim McNeff, Inc. ("McNeff, Inc."), pursuant to Section 301 of the Labor-Management Relations Act, 29 U.S.C. Section 185, in the Federal District Court for the Central District of California.

2. June 27, 1979 — McNeff files an answer to the Trustees' breach of contract suit.

3. January 15, 1980 — Trustees file a Motion for Summary Judgment.

4. January 21, 1980 — McNeff files a Motion for Summary Judgment.

5. February 11, 1980 — The District Court entered its order granting Trustee's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment.

6. March 13, 1980 — McNeff, Inc. files a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit.

7. February 8, 1982 — The United States Court of Appeals issues its Judgment and Opinion, *Todd v. McNeff*, 667 F.2d 800 (1982).

8. May 7, 1982 — McNeff, Inc. files its Petition for Writ of Certiorari with the United States Supreme Court (No. 81-2150).

9. July 2, 1982 —	United States Supreme Court grants Petition for Writ of Certiorari.

ITEM 1.
Complaint for Breach of Collective Bargaining Agreement.

United States District Court, Central District of California.

Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, John C. Maxwell, Dale I. Vawter, Jerald B. Laird, William Cobb, Jr., C. W. Poss, Verne W. Dahnke, Alexander Rados, William A. Floyd and Jerry Toll, each in his respective capacity as Trustee of the Operating Engineers Health & Welfare Fund; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, John C. Maxwell, William C. Waggoner, Dale I. Vawter, C. V. Holder, William A. Cobb, Jr., Alexander Rados, William A. Floyd, Edwin Kalish, Steve Billy, Winton Kemmis and Dean Sweeney, Jr., each in his respective capacity as Trustee of the Operating Engineers Pension Trust; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, Jerry Toll, William C. Waggoner, C. I. T. Johnson, Dale I. Vawter, Don McCoy, William A. Cobb, Jr., Alexander Rados, William A. Floyd and Dean Sweeney, Jr., each in his respective capacity as Trustee of the Operating Engineers Vacation-Holiday Savings Trust; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, Robert Lytle, Dale I. Vawter, Kenneth J. Bourguignon, Verne W. Dahnke, Winton Kemmis, William A. Floyd and Don MacIntosh, each in his respective capacity as Trustee of the Operating Engineers Training Trust, Plaintiffs, vs. Jim McNeff, Inc., a California corporation, and Jim McNeff, an individual, doing business as Jim McNeff Trucking and Equipment Rentals, Defendants. Case No. 79-1527 IH.

Filed: April 26, 1979.

Plaintiffs Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, John C. Maxwell, Dale I. Vawter, Jerald B. Laird, William Cobb, Jr., C. W. Poss, Verne W. Dahnke, Alexander Rados, William A. Floyd, Jerry Toll, C. V. Holder, Edwin Kalish, Steve Billy, Winton Kemmis, Dean Sweeney, Jr., C. I. T. Johnson, Don McCoy, Robert Lytle, Kenneth J. Bourguignon, and Don MacIntosh complain and allege as follows:

1. This action for breach of contract is to recover fringe benefit contributions obligated by the terms of a collective bargaining agreement and is brought by the Trustees of certain joint Labor-Management Trusts created pursuant to 29 U.S.C. §186(c).

2. This Court has jurisdiction under 29 U.S.C. §185, insofar as this is a cause of action involving a breach of a collective bargaining agreement.

3. Plaintiffs, Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, John C. Maxwell, Dale I. Vawter, Gerald B. Laird, William Cobb, Jr., C. W. Poss, Verne W. Danhke, Alexander Rados, William A. Floyd and Jerry Toll are Trustees and together constitute the Board of Trustees of the Operating Engineers Health and Welfare Fund, and bring this action in their official capacities as such.

4. Plaintiffs, Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, John C. Maxwell, William C. Waggoner, Dale I. Vawter, C.V. Holder, William Cobb, Jr., Alexander Rados, William A. Floyd, Edwin Kalish, Steve Billy, Winton Kemmis and Dean Sweeney, Jr., are Trustees and together constitute the Board of Trustees of the Operating Engineers Pension Trust, and bring this action in their official capacities as such.

5. Plaintiffs, Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, Jerry Toll, William C. Waggoner, C.I.T. Johnson, Dale I. Vawter, Don McCoy, William Cobb, Jr., Alexander Rados, William A. Floyd, and Dean Sweeney, Jr. are Trustees and together constitute the Board of Trustees of the Operating Engineers Vacation-Holiday Savings Trust, and bring this action in their official capacities as such.

6. Plaintiffs, Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, Robert Lytle, Dale I. Vawter, Kenneth J. Bourguignon, Verne W. Danhke, Winton Kemmis, William A. Floyd and Don MacIntosh are Trustees and together constitute the Board of Trustees of the Operating Engineers Training Trust, and bring this action in their official capacities as such.

7. Said Operating Engineers Health and Welfare Fund, Operating Engineers Pension Trust, Operating Engineers Vacation-Holiday Savings Trust, and Operating Engineers Training Trust (hereinafter collectively denominated "Trusts") are express trusts created and adopted by collective bargaining agreements between the International Union of Operating Engineers, Local Union No. 12 (hereinafter "Local 12"), and various employer associations in the construction industry in Southern California.

8. Plaintiffs are informed and believe and allege thereon that defendant Jim McNeff, Inc., has for all relevant times been a corporation organized and existing under and by virtue of the laws of the State of California and transacting business as a construction contractor therein. Plaintiffs are informed and believe and allege thereon that defendant Jim McNeff is an individual who is the principal of Jim McNeff, Inc. and who also is the sole proprietor of an equipment rental company known as Jim McNeff Trucking and Equipment Rental.

9. On or about September 13, 1978, Jim McNeff, Inc. executed and delivered to Local 12, a written short-form collective bargaining agreement (hereinafter "Agreement") wherein Jim McNeff, Inc. agreed to be bound by all the terms and conditions of written and existing multi-employer agreements, and in particular the Master Labor Agreement (hereinafter "MLA"), in effect in the area in which Jim McNeff, Inc. was working and applicable to its operations and to all renewals, modifications and extensions thereof. A true copy of said Agreement is attached hereto as Exhibit "A".

10. Jim McNeff, Inc. also agreed to be bound by the Trust Agreements establishing the Operating Engineers Trusts, and further agreed said Agreement shall continue in full force and effect unless either party shall give written notice to the other party at least sixty (60) days prior to the termination of the MLA, of its desire to terminate the Agreement. At all times relevant herein, neither party has given notice to terminate, and said Agreement, as well as the MLA and the Trust Agreements have been in full force and effect.

11. By said Agreement, and in accordance with the terms of the MLA, Jim McNeff, Inc. promised that it would contribute and pay fringe benefit contributions to the respective Trusts referred to herein at the rates specified in the Agreement and MLA for each hour worked (or paid) by employees covered by the Agreement and MLA. Said Agreement further provided that amounts would be paid to said Trusts at their place of business in the City of Los Angeles, County of Los Angeles, State of California on or before the tenth (10th) day of each successive month. Plaintiffs are informed and believe and allege thereon that Jim McNeff, Inc. has not complied with its duty to pay fringe

benefit contributions due on hours worked (or paid) its covered employees.

12. Plaintiffs are informed and believe and allege thereon that Jim McNeff doing business as Jim McNeff Trucking and Equipment Rental is a joint employer together with Jim McNeff, Inc. and is, for purposes of this action, bound to the terms and conditions of the Agreement, MLA and Trust Agreements relevant herein.

13. Jim McNeff, Inc. is bound by the terms of the MLA and the Trust Agreements to allow an audit of its records to be conducted at a reasonable time and place upon written notice by the plaintiffs. Plaintiffs representatives appeared at the offices of Jim McNeff, Inc. on March 29, 1979, after the giving of written notice, to conduct an audit. No records were made available to them at that time.

14. Jim McNeff, Inc. further promised in the event of delinquency, it would pay all legal and auditing costs in connection with the delinquency, whether or not litigation were required to recover the unpaid contributions. Plaintiffs will conduct an audit of the books of Jim McNeff, Inc. as part of this litigation and the plaintiffs are entitled to reasonable costs for such audit.

15. By said Agreement and in accordance with the terms of the MLA, Jim McNeff, Inc. further promised that in the event any of said monthly contributions were not paid when due, it would pay the sum of $25.00 or ten percent (10%) of the total amount of the particular contributions when due, whichever is greater, for each delinquency, as and for liquidated damages and not as a penalty.

16. Plaintiffs and the Trusts and each of them have complied with all conditions precedent on their part to be performed under the terms of the aforementioned Agreement.

17. It has been necessary for the plaintiffs to engage the law firm of Wayne Jett, Lawyers, for the purpose of collecting said contributions and damages, and the Trusts are entitled to reasonable attorneys' fees in connection therewith.

WHEREFORE, plaintiffs pray for judgment as follows:

1. For contributions in an amount as by proof may be shown to be due;

2. For the reasonable costs of an audit of defendants' books and records;

3. For interest at the rate of seven percent (7%) per annum upon sums due from due dates;

4. For reasonable attorneys' fees;

5. For plaintiffs costs of suit;

6. For such other and further relief as this Court may deem just and proper.

DATED: April 25, 1979

WAYNE JETT, LAWYERS
By: /s/ Jon Crane
Jonathan B. Crane

EXHIBIT A.

AGREEMENT
WITH
THE INTERNATIONAL UNION OF
OPERATING ENGINEERS
LOCAL UNION NO. 12

THIS AGREEMENT is entered into this 13 day of Sept., 1978, by and between Jim McNeff Inc., hereinafter referred to as the CONTRACTOR, and the International Union of Operating Engineers, Local Union No. 12, hereinafter referred to as the UNION.

ARTICLE I

The CONTRACTOR hereby recognizes the UNION as the sole and exclusive bargaining representative of all employees of the CONTRACTOR performing work over which the UNION has jurisdiction.

ARTICLE II

The CONTRACTOR, not being signatory to any recognized Operating Engineers' multiple-employer agreement, hereby agrees to accept and be bound by all of the terms and conditions of multiple-employer agreements applicable to the CONTRACTOR'S operations and in effect in the area in which the work is performed as recognized, modified, re-negotiated, amended, and renewed from time to time through collective bargaining between the UNION and the applicable multiple-employer group. It is hereby agreed that the multiple-employer agreement(s) indicated below is the one most applicable to the EMPLOYER'S operations. Such multiple-employer agreement(s) is hereby adopted in its entirety, except those provisions in such multiple-employer agreement(s) which are in conflict with this agreement. Wherever such conflict exists the provisions of this agreement shall apply.

ARTICLE III

To the extent that any provisions in applicable multiple-employer agreements, adopted herein by reference, contain provisions with respect to grievance procedures, arbitrations (other than jurisdictional disputes under the Impartial Jurisdictional Disputes Board in the Building and Construction Industry), or commitments not to strike over grievances or claims of contract violation, the same shall not be in effect nor binding upon the parties to this agreement. In the place of such provisions the parties mutually agree to meet and attempt to settle all such grievances and claims of contract violation by direct negotiation between duly authorized representatives of each of the parties.

If the parties are unable to settle or adjust any such grievance or claim of contract violation, nothing contained in this agreement, expressly or by implication, shall in any way limit or modify the right of each party to enforce this agreement or adjust grievances by means of judicial or economic procedures, including picketing or withholding of services, except that enforcement of the subcontracting clause shall be by judicial procedures.

ARTICLE IV

This Agreement shall become effective as of the date shown above and shall continue in effect for the same term as the applicable multiple-employer labor agreements and for any renewals or extensions thereof, unless either party shall give written notice to the other party, not less than ninety (90) nor more than one hundred twenty (120) days prior to the termination date of the appropriate multiple-employer agreement, of its desire to terminate.

ARTICLE V

The multiple-employer agreement(s) indicated below is hereby adopted as the agreement(s) most nearly applicable to the employer's operations. It shall be considered in full

force and effect in the Union's geographic jurisdiction and in accordance with the provisions of Article II above.

(✓) Master Construction Agreement

EMPLOYERS:

Jim McNeff Inc.
Name of Company (Pls. Print)

92-241 National Ave. Box 949
Company Address

Mecca, Ca 92254
City, State Zip

342380
State License Number

Jim McNeff
Signed by

Jim McNeff
Signed by (Pls. Print)

President
Title

92-241 National Ave. Box 949 Mecca, Ca
Signatory Address

563-68-9170
Signatory Social Security No.

396-2592
Telephone Number

9-13-78
Date

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO.12

Wm. C. Waggoner
Business Manager

Verne W. Dahnke
President

Dale I. Vawter
Recording-Corresponding Secretary

Jerry Lanham
Business Representative

NAME OF COMPANY Jim McNeff Inc. STATE LICENSE NO. 342380

Street Address 92-241 National Ave. P.O. Box 949

City Mecca; State Calif.; Zip Code 92254; Phone 396-2592

Check Appropriate designation below:

☑ CORPORATION

R. M. O. Jim McNeff

Corporation: (List Officers)

President Jim McNeff
Vice-President
Secretary Christene McNeff
Treasurer

Incorporated in State of California on Jan. 26, 1978

Has your company or anyone associated with your company ever been associated with any other employer who at any time has been signatory to a labor agreement with IUOE, Local Union 12?

If so, give the name(s) of such other employer(s).

ACKNOWLEDGMENT AND ACCEPTANCE OF TRUST CHECK APPROPRIATE BOX AND SIGN ALONGSIDE APPLICABLE TRUST INDICATING ACCEPTANCE.

The undersigned employer by his signature acknowledges receipt of a true and correct copy of the Agreement establishing the Operating Engineers Trusts:

AND, further by his signature, accepts all of the terms and conditions of said Trust Agreements and agrees to be bound thereto in every way, including the obligation to make periodic contributions and payments pursuant to the requirement of the Board of Trustees consistent with said Trust Agreements and the Collective Bargaining Agreement

between said employer and Local 12, International Union of Operating Engineers.

A) PENSION TRUST	☑ By: Jim McNeff; Title Owner
B) HEALTH & WELFARE TRUST	☑ By: Jim McNeff; Title Owner
C) VACATION-HOLIDAY TRUST	☑ By: Jim McNeff; Title Owner
D) APPRENTICE TRUST	☑ By: Jim McNeff; Title Owner
E) JOURNEYMAN TRAINING TRUST	☑ By: Jim McNeff; Title Owner
F) INDUSTRY FUND TRUST	☑ By: Jim McNeff; Title Owner

DATE 9-15-78

Trust Copy

ITEM 2.
Answer to Complaint for Breach of Contract.

United States District Court, Central District of California.

Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, John C. Maxwell, Dale I. Vawter, Jerald B. Laird, William A. Cobb, Jr., C.W. Poss, Verne W. Dahnke, Alexander Rados, William A. Floyd and Jerry Toll, each in his respective capacity as Trustee of the Operating Engineers Health & Welfare Fund; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, John C. Maxwell, William C. Waggoner, Dale I. Vawter, C.V. Holder, William A. Cobb, Jr., Alexander Rados, William A. Floyd, Edwin Kalish, Steve Billy, Winton Kemmis and Dean Sweeney, Jr., each in his respective capacity as Trustee of the Operating Engineers Pension Trust; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, Jerry Toll, William C. Waggoner, C.I.T. Johnson, Dale I. Vawter, Don McCoy, William A. Cobb, Jr., Alexander Rados, William A. Floyd, and Dean Sweeney, Jr., each in his respective capacity as Trustee of the Operating Engineers Vacation-Holiday Savings Trust; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, Robert Lytle, Dale I. Vawter, Kenneth J. Bourguignon, Verne W. Dahnke, Winton Kemmis, William A. Floyd and Don MacIntosh, each in his respective capacity as Trustee of the Operating Engineers Training Trust, Plaintiffs, vs. Jim McNeff, Inc., a California corporation, and Jim McNeff, an individual doing business as Jim McNeff Trucking and Equipment Rentals, Defendants. Case No. 79 1527 IH.

Filed: June 27, 1979.

Defendants answer the Complaint as follows:

1. Answering paragraphs 3, 4, 5 and 6, defendants lack sufficient information or belief to answer the allegations of said paragraphs, and basing their denial on that ground, deny each and every allegation therein contained.

2. Answering paragraphs 10, 11, 12, 13, 14, 15, 16 and 17, defendants deny each and every allegation therein contained.

3. Answering paragraphs 1, 2, 7, 8 and 9, defendant admits the allegations therein contained.

FIRST AFFIRMATIVE DEFENSE TO ALL CAUSES OF ACTION

4. The Operating Engineers Union has never represented a majority of any defendants' employees. Thus, there was never a valid collective bargaining agreement between the Operating Engineers Union and any defendants.

SECOND AFFIRMATIVE DEFENSE TO ALL CAUSES OF ACTION

5. The collective bargaining agreement which the Complaint asserts exists between the Operating Engineers Union and defendants is a contract of adhesion, and thus, unenforceable at law.

THIRD AFFIRMATIVE DEFENSE TO ALL CAUSES OF ACTION

6. Plaintiffs are not properly licensed and registered with the State of California as a collection agency, and thus, may not legally bring this action.

FOURTH AFFIRMATIVE DEFENSE TO ALL CAUSES OF ACTION

7. Defendant Jim McNeff, Inc.'s execution of Exhibit A to the Complaint was under duress and was based in part on fraudulent misrepresentation re its meaning and effect.

WHEREFORE, defendants pray:

1. That plaintiffs take nothing by the suit herein;

2. Costs of suit;

3. For such other and further relief as the Court may deem proper.

DATED: June 25, 1979.

Respectfully submitted,
/s/ Steven D. Atkinson
STEVEN D. ATKINSON
Attorney for Defendants

ITEM 3.
Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment.

United States District Court, Central District of California.

Frank L. Todd, et al., etc., Plaintiffs, vs. Jim McNeff, Inc., et al., Defendants. No. CV 79-1527 IH.

Date: February 4, 1980.

Time: 10:00 A.M.

Plaintiffs, Frank L. Todd, et al., as Trustees of the Operating Engineers Trusts, submit the following Points and Authorities in support of their motion for summary judgment against Jim McNeff, Inc.

I
INTRODUCTION

This is an action for fringe benefit contributions and damages. Plaintiffs are the Trustees of four joint Labor-Management Trusts established by collective bargaining agreements between the International Union of Operating Engineers, Local No. 12 (hereinafter "Local 12") and various employer associations in Southern California. The defendant, Jim McNeff, Inc. is a California corporation which signed a short-form collective bargaining agreement with Local 12 (hereinafter "Agreement"). The Agreement incorporated by reference the Master Labor Agreement between Local 12 and the various employer associations of contractors in Southern California.

The damages claimed by plaintiffs are based on an audit conducted of Jim McNeff, Inc.'s books and records. The audit showed that Jim McNeff, Inc. failed to report or pay the fringe benefit contributions due under the Agreement and Master Labor Agreement with Local 12. Jim McNeff,

Inc. had operating engineers dispatched to the company from Local 12 but did not pay fringe benefit contributions on those employees.

Thereafter, the results of the audit were delivered to Jim NcNeff, Inc. The company then requested an election with the National Labor Relations Board (hereinafter "Board") to determine if Local 12 represented a majority of Jim McNeff, Inc.'s employees. The plaintiff trustees were not joined as a party in the request for an election by Jim McNeff, Inc.

Local 12 then filed an unfair labor charge against Jim McNeff, Inc. The plaintiffs were not a party to that charge either. The general counsel for the Board refused to file a complaint against Jim McNeff, Inc. based on the charge by Local 12. No hearing, either judicial or administrative, was held by the Board concerning the unfair labor practice charge.

As of the date of this motion, the Board has not held an election for the employees of Jim McNeff, Inc.

At the mandatory status conference held on December 18, 1979, the Court ordered the plaintiffs and the defendant to simultaneously file motions for summary judgment on January 14, 1980, and set a hearing date for February 4, 1980, on the motions. For the reasons set forth hereafter, plaintiffs contend that this court should enter summary judgment in their favor and against Jim McNeff, Inc.

II

THIS COURT HAS JURISDICTION OF THIS ACTION PURSUANT TO SECTION 301(a) OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947 [29 U.S.C. § 185(a)].

The recent Ninth Circuit cases of *Burke v. Ernest W. Hahn, Inc.*, 592 F.2d 542 (9th Cir. 1979) and *Waggoner v. C & D Pipeline Co.*, 601 F.2d 456 (9th Cir. 1979)

involved actions by the predecessor trustees to the plaintiffs and involved the same Master Labor Agreement in dispute in this action. Therefore, it is clear that there is federal jurisdiction in this action.

III

THERE ARE NO MATERIAL ISSUES OF FACT IN DISPUTE IN THIS ACTION BETWEEN PLAINTIFFS AND JIM MC NEFF, INC.

This action involves the determination of the following material facts:

A. Whether Jim McNeff, Inc., signed and became bound to a collective bargaining agreement with Local 12 on September 13, 1978.

B. If there is a collective bargaining agreement between Local 12 and Jim McNeff, Inc, whether Jim McNeff, Inc., breached the Agreement by failing to pay fringe benefit contributions to the Operating Engineers Trusts.

C. If there was a breach of the Agreement, whether plaintiffs' calculation of damages is accurate.

It is undisputed that on September 13, 1978, Jim McNeff, the president of Jim McNeff, Inc., signed the documents attached to the declaration of Leo A. Majich.

It is also undisputed that the three employees of Jim McNeff, Inc., became members of Local 12 shortly thereafter.

It is further undisputed that there has been no administrative hearing by the Board concerning the validity of this collective bargaining agreement. This Court cannot use principles of Res Judicata, or collateral estoppel, where there has never been a judicial hearing and where these plaintiffs have never had an opportunity to litigate the issues.

The Supreme Court stated:

> "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the Courts have not hesitated to apply res judicata to enforce repose."
> *United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 422, 86 S.Ct. 1545, 1560 (1966).

There has not been a judicial hearing before an administrative law judge to estop the plaintiffs from enforcing the contract. The plaintiffs are trustees of fringe benefit trusts and are independent fiduciaries under the terms of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. § 1104 et seq.).

The Board recognizes the independent relationship between the Trustees, the Union, and the Employers.

> "While the Operating Engineers Pension Trust Fund is a joint labor-management Fund established pursuant to Section 302(c)(5) of the Act, the trustees are fiduciaries under ERISA, whose sole obligation is to the beneficiaries of the Fund, and not to either of the collective bargaining parties. Although the trustees may entertain the recommendations of their appointing parties, they are bound to use their independent judgment with respect to the administration of the Trust Fund. Accordingly, we do not feel that the interest of the Trustees were adequately protected by allowing their counsel to consult with counsel for the [Union] during the hearing." *Camay Drilling Company*, 239 NLRB No. 138, at fn. 10.

In the *Camay* case, the Board reversed the decision of the administrative law judge because the Trustees were not permitted to participate as a party at the hearing, even though the trustees were notified of and represented by counsel at the hearing. In this case, there has never been a hearing and

the trustees were never notified of any charges being filed by the employer or the Union.

The jurisdiction of the Board does not extend to the independent interpretation of labor agreements. National Labor Relations Act Section 10 (a), 29 U.S.C § 160(a), *Provision House Workers Union, Local 274 v. NLRB*, 493 F.2d 1249 (9th Cir. 1974). A breach of a written collective bargaining agreement may not be an unfair labor practice subject to the jurisdiction of the Board. *Id.*

The holding of an election by the Board is likewise an event which has no collateral estoppel consequences to the action herein. In *Inland Empire Counsel v. Millis*, 325 U.S. 697 (1945), the Supreme Court discussed the Board's function in election proceedings as follows:

> "These requirements are related to the character of the proceeding of which the hearing is only a part. That proceeding is not technical. It is an investigation, essentially informal, not adversary. The investigation is not required to take to any particular form or confined to the hearing." 325 U.S. at 706-707.

In *Paramount Transport Systems v. Chauffeurs Local 150*, 436 F.2d 1064 (1971), the Ninth Circuit stated that res judicata

> "should be accorded only to those findings upon material issues that are supported by substantial evidence on the administrative record as a whole." *Id.*, 436 F.2d at 1066.

Therefore, the factual and legal determination of the existence of a contract between McNeff, Inc. and Local 12 has never been decided. Therefore, this Court should find that because McNeff, Inc. signed a written collective bargaining agreement and because its employees became members of Local 12 shortly thereafter, there is a valid and enforceable agreement.

The Agreement and Master Agreement signed by McNeff, Inc. clearly requires McNeff, Inc. to pay fringe benefit contributions to the plaintiffs based on the hours worked by or paid to its employees performing work covered by the Agreement. See Articles VI, VII, VIII, IX and X, pp. 72-77, and attachment No. 2, p. 148, Master Labor Agreement attached to declaration of Leo A. Majich.

It is undisputed that McNeff, Inc. never reported or paid any fringe benefit contributions to the plaintiffs.

The audit conducted of the defendant's books and records shows that it had operating engineers dispatched to it to perform operating engineer work. The Master Labor Agreement has been interpreted by the Ninth Circuit to require fringe benefit contributions on those employees dispatched to a contractor, regardless of the particular task assigned to the operating engineer by the employer. *Waggoner v. C & D Pipeline Company, supra,* at 459. Therefore, the failure of McNeff, Inc. to report and pay fringe benefit contributions on its operating engineers dispatched by Local 12 establishes the breach of the Master Labor Agreement. The mechanical calculations of the actual hours worked by the employees of Jim McNeff, Inc. by the auditor has not been contested. Therefore, the calculation of damages is accurate and this Court should enter judgment in that amount.

The audit, in addition to making a claim on the employees of Jim McNeff, Inc., makes a claim on two "owner-operators" who were paid by Jim McNeff, Inc. The Master Labor Agreement contains specific requirements concerning the use of owner-operators by contractors. See Article XII, R, pp. 101-104 of Master Labor Agreement. Jim McNeff, Inc. was required to make each of the owner-operators its bona fide employee, effective from the first hour of work performed on the job or project. Master Labor Agreement,

p. 103. The Ninth Circuit has upheld the legality of this clause in enforcing a companion master agreement between Local 12 and the Field Surveyors Association. *Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105, 1114-1115 (1979).

The three material issues of fact to be resolved by this Court are not in dispute. Therefore, summary judgment is appropriate. Because the Ninth Circuit has already ruled on the interpretation of this Master Labor Agreement, this Court should enter summary judgment in favor of plaintiffs for the full amount of the audited claim.

IV

THE RECENT SUPREME COURT DECISION OF *N.L.R.B. v. LOCAL UNION NO. 103* IS NOT A LEGAL DEFENSE TO THIS ACTION.

Defendant Jim McNeff, Inc. has indicated that it will rely on *N.L.R.B. v. Local Union No. 103*, ___ U.S. ___, 98 S.Ct. 651 (1978) ("Higdon"). In this case, the Supreme Court determined whether a union violated section 8(b)(7)(c) of the National Labor Relations Act [29 U.S.C. § 158(b)(7)(c)] by picketing to protest alleged violations of a pre-hire contract entered into by Local 103 and Higdon pursuant to section 8(f) of the NLRA [29 U.S.C. § 158(f)]. The Supreme Court upheld the decision by the Board, even though it expressed doubts concerning the Board's decision. *N.L.R.B. v. Local Union No. 103, supra*, at 660. The holding of *Higdon* can be summarized as follows: The NLRB did not abuse its discretion in holding that pre-hire contracts cannot be enforced by picketing if the union has never obtained a majority status.

The holding in *Higdon* does not apply here, where Local 12 obtained a clear majority of employees several days after

McNeff, Inc. voluntarily signed the 8(f) agreement. The Supreme Court states:

> "It is also undisputed that when the union successfully seeks majority support, the pre-hire agreement attains the status of a collective-bargaining agreement executed by the employer with a union representing a majoity of the employees in the unit." *N.L.R.B. v. Local Union No. 103, supra,* at 660.

The Supreme Court stated that majority status is a subject for ligitation in a section 301 suit to enforce a section 8(f) contract. *N.L.R.B. v. Local Union No. 103, supra,* at 661. Here, the facts establish that Local 12 was a majority union and the employer voluntarily had members of Local 12 dispatched to its company to perform operating engineer work. There was no picketing involved in this action. The company merely breached its collective bargaining agreement by failing to pay the fringe benefit contributions due its employees performing operating engineer work and further failed to abide by the terms of the contract in making owner-operators its bona fide employees. After the company was caught by the trust's auditor, it then attempted to avoid a contract it had used to its benefit.

Therefore, the decision in *N.L.R.B. v. Local Union No. 103, supra,* supports plaintiffs' position.

As an additional item to distinguish the *Higdon* case from the dispute herein, the *Higdon* contract did not have a "union security" clause such as the one in the Master Labor Agreement herein. Such a clause requires an employer, here Jim McNeff, Inc., to utilize employees who are members of the union. The Third Circuit in *N.L.R.B. v. Irvin-McKelvey,* 475 F.2d 1265 (3rd Cir. 1975) cited in *Higdon* (98 S.Ct. at 658), gave great weight to the presence of a union security clause in the pre-hire agreement. The court stated:

> "... When the union's role has, by the operation of [union security] clauses, been brought home to the employees quite directly, and they have refrained from seeking a representation election, an employer is not free to repudiate his section 8(f) contract during its term." *N.L.R.B. v. Irvin-McKelvey, supra,* at 1271.

Article II, D and E of the Master Labor Agreement, pp. 11-12, are union security clauses. Article II, D, requires employees to have gained union membership within eight days of first employment and to remain members as a condition of continued employment. Article II, E, requires the employer to discharge any employee who does not maintain his union membership.

The *Higdon* case took place in a "right-to-work" state where there was no union security clause and where it was impossible to determine if the union signatory to the prehire agreement had in fact represented the majority of employees involved. *N.L.R.B. v. Local Union No. 103, supra,* at 652.

The union security clauses of the Master Labor Agreement give rise to a presumption of majority status on the part of the union. The facts show that the employees in fact became members of Local 12. The defendant has no affirmative evidence to the contrary. Furthermore, if the employer, in breach of its agreement with Local 12, employed persons who were not members of Local 12, it cannot use its own breach of the contract as a defense to the enforcement of the very contract it violated.

V

CONCLUSION

Based upon the foregoing, it is respectfully requested that this Court enter summary judgment in favor of plaintiffs for

the full amount of fringe benefit contributions and damages requested.

Dated: January 14, 1980.

Respectfully submitted,
WAYNE JETT, LAWYERS
By: Christopher M. Laquer
Christopher M. Laquer
Counsel for Plaintiffs

ITEM 4.
Declaration of Jack E. McClendon in Support of Plaintiffs' Motion for Summary Judgment With Exhibit A Thereof.

United States District Court, Central District of California.

Frank L. Todd, et al., Plaintiffs, vs. Jim Mc Neff, Inc. et al., Defendants. No. CV-79-1527-IH.

Date: February 4, 1980.

Time: 10:00 a.m.

State of California, County of Los Angeles — ss.

I, JACK E. McCLENDON, declare:

1. I make this declaration in support of plaintiffs' motion for summary judgment in the above referenced action.

2. At all times since January, 1978, I have been and am now employed as an auditor for the Southern California Operating Engineers Benefits Administration, Inc. Said organization is a non-profit corporation, organized and existing to perform administrative services exclusively for the Operating Engineers Trusts. My job duties consist of examining the books and records of employers bound to the Collective Bargaining Agreements with the International Union of Operating Engineers, Local No. 12 (hereinafter "Local 12") to verify that the employer is properly paying all of the fringe benefit contributions due the Operating Engineers Trusts pursuant to the particular collective bargaining agreement signed by the contractor.

3. Pursuant to a written request by the Operating Engineers Trusts, I went to the business address of Jim McNeff, Inc., located at 92241 National Avenue, Mecca, California, to conduct an audit. At that time, I met Mr. Jim McNeff, who gave me the check register for Jim McNeff,

Inc. The Operating Engineers Trusts had requested time cards, payroll ledgers, individual employee wage records, federal and state tax returns and all cash disbursements journals. Mr. McNeff advised me that there were no tax returns for the corporation because he had never filed a return with either the United States Government or the State of California. Mr. McNeff further stated that he did employ men doing some operating work but they were working for his "non signatory" company known as Jim McNeff Trucking and Equipment Rentals. Because I was unable to examine all of the normal business records, I requested our attorneys to cause the employer to furnish the additional records needed to complete the audit properly.

4. Pursuant to an agreement entered into between Mr. McNeff and our attorneys, I was able to complete my audit of Jim McNeff, Inc. on June 1, 1979, at the offices of Jewel Garrett, the bookkeeper for Jim McNeff, Inc, in Indio, California. At that time, I still did not examine any tax return or tax records of the corporation because they apparently did not exist. I examined all of the records supplied to me relating to Jim McNeff, Inc., and made notes relating to payments to individuals who may have been performing work as operating engineers. During the course of the audit, I called the offices of Local 12 to determine whether any of the individuals paid by Jim McNeff, Inc. were members of Local 12. I determined that the three employees of Jim McNeff, Inc., had been dispatched by Local 12 to the company on September 15, 1978. On June 6, 1979, I prepared a memorandum to Leo A. Majich, the administrator of the Operating Engineers Trusts, summarizing the information I obtained as a result of my examination of the books and records on June 1, 1979. I further prepared a summary of the claim broken down for each employee and each month where a claim for fringe benefit contributions was made.

Attached hereto as Exhibit "A" and by this reference incorporated herein is a true and correct copy of my memorandum dated June 6, 1979, to Leo A.Majich and my accounting summary which I personally prepared.

5. Attached hereto as Exhibit "B" is a true and correct copy of the check off authorization for the three employees dispatched by Local 12 to Jim McNeff, Inc., which I obtained from the offices of Local 12.

I declare under penalty of perjury that the above is true and correct.

Executed on January 14, 1980, at Pasadena, California.

/s/ Jack E. McClendon
Jack E. McClendon

EXHIBIT A.

MEMORANDUM

TO: LEO A. MAJICH JUNE 6, 1979

FROM: JACK E. MC CLENDON

SUBJECT: PAYROLL AUDIT Account #: 342380

EMPLOYER: JIM MCNEFF, INC.
Signatory to So. Calif. Constr. Agreement (AS)

An audit of the payroll and related records was performed on this employer on June 1, 1979, to ascertain that all hours have been reported to these Trusts correctly. This audit included examination of cash disbursements in the form of check stubs. The audited period was September 13, 1978, through April 1979.

The audit resulted in finding a deficiency of these Trusts. The claim involves:

1. M. Felix (561-60-2708) dispatched 9/15/78. Mr. Felix was paid two (2) different hourly wage rates; $7.00 per hour for work other than operating and $12.14 per hour worked while operating equipment. When no hourly wage appeared on the check stubs the amount earned was divided by the operating rate of $12.14.
2. D. Reed (528-28-8914) dispatched 9/15/78. Paid at two (2) different hourly wage rates. When no hourly rate appeared the claim is made on the operating rate.
3. M. Deacon (554-82-7622) dispatched 9/15/78. Paid at two (2) different hourly wage rates. When no hourly rate appeared the claim is made on the operating rate.

4. D. Hendrickson. No Social Security Number. Claimed as the disbursements identified the employee as Doug Hendrickson Back Hoe Service.
5. L. Wilson (564-50-8004) an I.U.O.E., Local 12 member. Owner-Operator. No hourly rate was given. The amount earned was divided by an estimated Owner-Operater rate of $30.00

The agreement the employer has with I.U.O.E., Local No. 12, provides that all work performed and all services rendered by employees shall be rendered under terms and provisions at no less than those specified in the agreement. The total unreported hours for the audited period are 1094.5 in the amount of $4,651.63. distributed as follows:

Vacation/Holiday	$ 766.15
Health & Welfare	1,203.95
Pension	2,517.35
Apprentice/Journeyman	153.23
Industry Advancement	10.95
Total	$4,651.63
10% Liquidated Damages	$ 465.16
Audit Assessment	200.00
Total	$ 665.16
TOTAL AMOUNT DUE	$5,316.79

The distribution of hours per employee per month is detailed on the attached sheet.

JEM/lde
cc: Wayne Jett
Jonathan B. Crane

ITEM 5.
Declaration of Leo A. Majich in Support of Plaintiffs' Motion for Summary Judgment with Excerpts of Exhibit D Thereof.

United States District Court, Central District of California.

Frank L. Todd, et al., etc., Plaintiffs, vs. Jim McNeff, Inc., et al., Defendants. Case No. CV 79-1527 IH.

Date: February 4, 1980.

Time: 10:00 a.m.

State of California, County of Los Angeles — ss.

I, Leo A. Majich, declare:

1. I make this declaration in support of plaintiffs' motion for summary judgment in the above-referenced action.

Declarant's Qualifications

2. At all times since January, 1972, I have been and am now the Administrator of the Southern California Operating Engineers Benefits Administration, Inc. Said organization is a non-profit corporation, organized and existing to perform administrative services exclusively for the Operating Engineers Health & Welfare Fund, Operating Engineers Pension Trust, Operating Engineers Vacation-Holiday Savings Trust and Operating Engineers Training Trust (hereinafter collectively referred to as "Trusts").

3. From 1952 through December, 1971, I was principally employed in the construction industry in Southern California, and was part-owner of a construction contracting company. During that period of time, my company was a member of the Associated General Contractors' of California, Inc. (hereinafter "AGC"), an organization established and existing to promote the interests of employers in the construction industry in Southern California. I served as

president of AGC during 1966 and 1967. I was a member of its board of directors from 1962 through 1964 and again from 1966 through 1969. In was a member of the AGC Labor Committee from 1955 through 1971. In 1964 I became chairman of the AGC Labor Committee and, at the same time, became chairman of the Southern California Contractors' Negotiating Committee. This Committee was and is the Committee which represents the several multiemployer associations for the construction industry in Southern California in labor negotiations with various construction trade unions, one of which was the International Union of Operating Engineers, Local Union No. 12 (hereinafter "Local 12"). As chairman of the Negotiating Committee, I was the spokesman in substantially all matters relating to negotiations of industry-wide collectively bargainined agreements with Local 12. In 1969, I served as the chairman of the Negotiating Committee in negotiating an industry-wide collective bargaining agreement with Local 12. As a result of these negotiations, a Master Labor Agreement was entered into between the Southern California General Contractors' Associations and Local 12 for the period of 1969 to 1974.

4. In addition, I have served at various times as a Trustee of various of the Operating Engineers Trusts. I was one of the original Trustees of the Operating Engineers Health & Welfare Fund and served as trustee from 1958 through 1966, and from 1969 through 1971. I was the original Chairman of the Board of Trustees of the Operating Engineers Pension Trust from 1959 through 1966. From 1969 until December, 1971, I served as Trustee of the Operating Engineers Pension Trust and Operating Engineers Vacation-Holiday Savings Trust

5. In my capacity as Administrator of the Trusts, I am the person chiefly responsible to the Board of Trustees of

each of the Trusts for supervising the staff which performs administrative functions for the Trusts. These administrative functions include receiving monthly reports and fringe benefit contributions from employers, apportioning amounts received to the appropriate Trusts, crediting individual employees for work performed, handling claims and determining entitlement to benefits for beneficiaries, and maintaining substantially all business records of the Trusts.

6. Based on the foregoing, I have first hand knowledge and am intimately familiar with the operations of each of the Trusts, the meaning of the Master Labor Agreements between Local 12 and the employers and the custom and practice of employers and Local 12 concerning all aspects of the Master Agreements.

Practice of Maintaining Employer Files

7. The administrative office of the Trusts, of which I am in charge, maintains an employer file for each employer signed to a collective bargaining agreement with Local 12. This employer file customarily contains the original or copy of any written agreement between the employer and Local 12, original monthly reports (showing identities of employees, hours worked and contributions due) submitted by the employer to the administrative office, the originals or copies of correspondence regarding the employer, a record of claims made by employees that certain hours worked by the employee have not been properly reported or paid by the employer, a copy of any audit of the employer's business records made on behalf of the Trusts to verify proper reporting of hours and, where the employer has failed to pay amounts that are due, copies of statements to the employer showing the amount due each of the Trusts.

Labor Agreement Identified and Described

8. I have reviewed the employer file maintained by the Trusts for defendant Jim McNeff, Inc. (hereinafter "McNeff") and, based thereon, am able to state the following:

A. Attached hereto as Exhibit "A", and by this reference incorporated herein is a true and correct copy of the original document entitled "Agreement with the International Union of Operating Engineers, Local Union No. 12" which is dated September 13, 1978, and signed by Jim McNeff as president of Jim McNeff, Inc.

B. Attached hereto as Exhibit "B", and by this reference incorporated herein is a true and correct copy of a document entitled "Acknowledgment and Acceptance of Trusts" signed by Jim McNeff on behalf of Jim McNeff, Inc.

C. Attached hereto as Exhibit "C", and by this reference incorporated herein are true and correct copies of the original monthly reports submitted to the Trusts by McNeff for the months of October, 1978 through March, 1979. McNeff has not filed any monthly report with the Trust since March, 1979.

D. Attached hereto as Exhibit "D", and by this reference incorporated herein is a true and correct copy of the Master Labor Agreement between Local 12 and the Southern California General Contractors' Associations for the period of July 1, 1977, to June 15, 1980 (hereinafter "Master Agreement"). This is the Master Construction Agreement referred to in the Agreement signed by Local 12 and McNeff.

E. Attached hereto as Exhibit "E", and by this reference incorporated herein is a true and correct copy of the Agreement and Declaration of Trust Establishing the Operating Engineers Health and Welfare Fund.

F. Attached hereto as Exhibit "F", and by this reference incorporated herein is a true and correct copy of the letter from the Trusts to McNeff dated November 30, 1978, requesting an audit of McNeff's payroll records. A review of the correspondence and memoranda of telephone conversations in the McNeff file show that this audit date was postponed several times and eventually conducted on June 1, 1979.

9. Based on my personal work as a contractor in Southern California, as a negotiator for AGC in its negotiations with Local 12 for the Master Labor Agreements, as a Trustee of the Trusts, and as Administrator of the Trusts, I have personal knowledge of the custom and practice in the construction industry in Southern California relating to the collective bargaining agreements between contractors and Local 12. Since I have been a contractor, the custom and practice in the construction industry in Southern California regarding "short-form" agreements with Local 12 is that when a contractor signs a short-form agreement with Local 12, the contractor's existing employees who were performing work covered by the Master Agreement are permitted to join Local 12 immediately, thereby permitting the contractor to keep its existing work force and permitting the employees to become members of Local 12 without an apprenticeship.

10. Attached hereto as Exhibit "G" and by this reference incorporated herein is a true and correct copy of the Minutes of the meeting of the Labor Management Adjustment Board, held on July 26, 1972. I was present at the meeting, the minutes were prepared shortly after the meeting, and were approved by the Board and are an accurate summary of what took place at the meeting.

11. The Trusts incurred a reasonable cost for conducting and completing the audit of $200.00.

12. The Trusts have paid or agreed to pay their attorneys Wayne Jett, Lawyers, $1,802.50, for the prosecution of this action. The hourly rate charged the Trusts varied from $40.00 to $45.00, depending on the attorney performing the work.

I declare under penalty of perjury that the above is true and correct.

Executed on January 10, 1980, at Pasadena, California.

/s/ Leo A. Majich
Leo A. Majich

EXHIBIT "D".

SOUTHERN CALIFORNIA MASTER Labor Agreement

Between

THE INTERNATIONAL UNION OF OPERATING ENGINEERS

AND THE

SOUTHERN CALIFORNIA GENERAL CONTRACTORS ASSOCIATIONS

Except San Diego County

July 1, 1977 to June 15, 1980

ARTICLE II

* * *

D. Employees employed by one or more of the Contractors for a period of eight (8) days continuously or accumulatively under the work jurisdiction of a particular Union as that term is defined herein shall be or become on the eighth (8th) day or eight (8) days after the effective date of this Agreement, whichever is later, members of such Union and shall remain members of such Union as a condition of continued employment. Membership in such Union shall be available upon terms and qualifications not more burdensome than those applicable at such times to other applicants for membership to such Union.

E. The Contractor shall discharge any employee pursuant to the foregoing section upon written notice from the Union of such employee's non-payment of initiation fees or dues.

ARTICLE IV

* * *

D. The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use), except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

ITEM 6.

Declaration of Jim McNeff in Support of Defendant's Motion for Summary Judgment.

United States District Court, Central District of California.

Frank L. Todd, et al., Plaintiffs, vs. Jim McNeff, Inc. et al., Defendants. No. CV-79-1527-IH.

Date: February 4, 1980.

Time: 10:00 A.M.

Filed: January 2, 1980.

State of California, County of Orange — ss,

I, JIM MCNEFF, declare:

1. I make this declaration in support of defendants' motion for summary judgment in the above-captioned action.

2. I am the president of Jim McNeff Inc. ("McNeff") which is engaged in the construction and agricultural industries in Southern California with its principal place of business located in Mecca, California.

3. On September 13, 1978 I was approached by Jerry Lathaim, a business representative of Operating Engineers Local Union No. 12 ("Local 12"). Lathaim told me I had to join the union or leave the job. I refused to join. Lathaim left and returned with Dave Harmon, the superintendant for Keith Dewar Construction, the general contractor on the project. Harmon told me I had to sign with the union that day or leave the job. I then agreed to sign the contract. We went into Dewar's construction trailor and I signed some documents. Lathaim and I then went to my three employees, Milton Deacon, Mike Feliz, and Dennis Read and I told them they had to join the union or they could not work. All three of them signed union cards.

4. I did not read the Master Labor Agreement before I signed the contract nor have I ever read it. I did not pay the wage rates or benefits in the Master Labor Agreement ("Agreement") nor did I abide by the terms of that document.

5. At the end of September the Dewar job was complete and Felix quit. Reed and Deacon continued to work for McNeff on agricultural jobs. McNeff hired other employees as needed without complying with the requirements of the Agreement.

6. In March I was approached by a representative of the trust funds who wanted to audit McNeff's books. A disagreement arose and the trust funds sued McNeff in this lawsuit.

7. McNeff then filed a petition with the NLRB on May 22, 1979 seeking an election to determine whether its employees wanted to be union.

8. Local 12 then filed an unfair labor practice with the NLRB saying McNeff was in violation of the Agreement.

9. I gave evidence to my attorney who then presented the evidence to the NLRB in the investigation of the unfair labor practice charge.

10. On July 10, 1979 the NLRB issued a letter finding I was not bound to a contract with Local 12.

11. The NLRB then scheduled an election for my employees in August.

12. Shortly before the election Local 12 filed an appeal of the NLRB's decision so the election was postponed.

13. On November 8, 1979 the Division of Appeals rejected Local 12's appeal and found there was never a valid agreement.

14. The election is now scheduled for January 23, 1980.

DATED: January 19, 1980.

/s/ Jim McNeff

ITEM 7.
Defendant's Memorandum of Points and Authorities in Support of Motion for Summary Judgment With Exhibits A and B Thereof.

United States District Court, Central District of California.

Frank L. Todd, et al., etc., Plaintiffs vs. Jim McNeff, Inc., et al., Defendants. No. CV 79-1527-IH.

Date: February 4, 1980.

Time: 10:00 A.M.

Filed: January 21, 1980.

Defendants, Jim McNeff, Inc., et al., submit the following Points and Authorities in support of their motion for summary judgment against plaintiffs, Frank L. Todd, et al., as Trustees of the Operating Engineers Trusts.

I. INTRODUCTION

This is an action by the Trustees of four employee benefit trusts for fringe benefit contribution and damages required by an allegedly enforceable collective-bargaining agreement entered into by, Jim McNeff (hereinafter "McNeff"), and the International Union of Operating Engineers, Local NO. 12 (hereinafter "Local 12") on September 13, 1978.

The plaintiffs are the trustees of four joint labor management trusts established by collective bargaining agreements between Local 12 and various employer associations in Southern California. Jim McNeff, Inc., is a California Corporation, engaged in construction and agricultural work, which signed a short-term collective-bargaining agreement with Local 12 (hereinafter "Agreement"). The Agreement incorporated by reference the Master Labor Agreement between Local 12 and various employer associations of contractors in Southern California.

II. FACTS

McNeff is engaged in the construction and agricultural industries in Southern California with its principal place of business located in Mecca, California.

On September 13, 1978 Jim McNeff, the president of McNeff, was approached on a jobsite by Jerry Lathaim a business representative of Local 12. Lathaim informed Jim McNeff that McNeff had to join the union or leave the job. McNeff refused to sign a union contract. Lathaim then returned with the job superintendant who told McNeff that he had to sign with the union that day or leave the job. McNeff then signed the Agreement. McNeff and Lathaim then informed McNeff's employees that they had to join the union or they could not work.

McNeff did not read the Agreement before he signed it nor has he ever read it. McNeff did not pay its employees the wage rates and benefits set forth in the Agreement nor did McNeff follow the other terms of the Agreement.

After this lawsuit was filed McNeff filed a petition for an election with the National Labor Relations Board (hereinafter "NLRB") to determine which employees constituted an appropriate bargaining unit and whether the employees wished to be represented by Local 12. (a copy of that petition is attached as Exhibit A).

On June 4, 1979 Local 12 filed an unfair labor practice charge with the NLRB alleging that McNeff had repudiated and failed to comply with its agreement with Local 12 in violation of the National Labor Relations Act (hereinafter "NLRA"). (copy attached as Exhibit B).

The NLRB investigated Local 12's unfair labor practice charge and received evidence from McNeff. On July 10, 1979 the NLRB dismissed the charge finding that while the parties executed an agreement a full collective-bargaining

relationship was never established. The NLRB found that McNeff repudiated the contract from its inception and signed the contract as a surface gesture without the intent of entering into a collective-bargaining relationship. (copy of dismissal letter attached as Exhibit C).

The NLRB then scheduled an election for McNeff's employees in August, 1979. Before the election Local 12 appealed the NLRB's decision to the NLRB's Office of Appeals in Washington, D.C.

On November 8, 1979 the Office of Appeals denied the appeal finding the employer was forced to sign the agreement but repudiated it immediately and never implemented any of its terms. The Office of Appeals also noted that the union did not object to the repudiation until June, 1979. (a copy of the denial is attached as Exhibit D).

The NLRB election is now scheduled for January 23, 1980.

III. LEGAL ARGUMENT

1. *Absent a showing that Local 12 is the uncoerced collective bargaining representative of a stable majority of McNeff's employees the contract is unenforceable.*

It is respectfully submitted that the recent U.S. Supreme Court Case, *NLRB v. Local Union 103*, 434 U.S. 335, 98 S. Ct. 651 (1978) (*Higdon*) is controlling. In that case, the Supreme Court determined that a union violated section 8(b) (7) (C) of the NLRA [29 U.S.C. § 158(b) (7) (C)] by picketing to protest alleged violations of a "pre-hire contract entered into by Local 103 and Higdon pursuant to Section 8(f) of the NLRA [29 U.S.C. § 158 (f)]. The Court analyzed the Section 8(f) [29 U.S.C. § 158 (f)] construction industry exception to the Section 7 [29 U.S.C. § 157] guarantee that employees are able to "bargain collectively with representatives of their own choosing." Through the 8(f) exemption

the execution of voluntarily executed agreement with a non-majority Union, an act normally an unfair labor practice, is legitimatized. General Counsel's Memorandum 79-32, P 4-6 (copy attached as Exhibit E). As stated in *Higdon, supra* at P 345

> "The exemption is nevertheless of limited scope, for the usual rule protecting the union from inquiry into its majority status during the term of a collective-bargaining contract does not apply to pre-hire agreements"
>
> "The employer's duty to bargain and honor the contract is contingent on the union's attaining majority support at the various construction sites"

Herein, McNeff signed a section 8(f) agreement with Local 12. However, the enforceability of that contract turns on whether Local 12 ever represented an uncoerced majority of McNeff's employees in an appropriate collective bargaining unit. This is the identical issue decided by the regional attorney and the General Counsel of the NLRB in refusing to file a complaint against McNeff in response to Local 12 charges of a section 8(a)(1) [29 U.S.C. § 158 (a)(1)] and section 8(a)(5) [29 U.S.C. § 158(a)(5)] violation.

The charges filed with the NLRB by Local 12 alleged that McNeff was bound to the Agreement and was in violation of that Agreement. McNeff was in violation of the Agreement as noted in both Exhibits B and C since McNeff repudiated the contract from its inception and never paid the wage rates and trust fund benefits required by the Agreement. However, the NLRB found McNeff was not in violation of the Act because the agreement was never valid inasmuch as McNeff's employees did not freely designate Local 12 as their representative. The NLRB also noted that McNeff's execution of the Agreement was not voluntary.

McNeff was coerced into signing an Agreement with Local 12. McNeff then required its employees to join Local 12 but never applied the terms and conditions of that Agreement and McNeff's employees soon dropped their Local 12 membership. Thus, as found by the NLRB, this Agreement is not enforceable since Local 12 has never established itself as the uncoerced majority representative of McNeff's employees.

2. *The court should defer to the NLRB's decision on the basis of primary jurisdiction.*

In San Diego Building Trades Council v. Garmon 359 U.S. 236, 242-243, 79 S. Ct. 773, 3. L. Ed. 2d 775 the Court provided what has come to be accepted as the general guideline for determining the extent to which the NLRB's primary jurisdiction preempts State and Federal Courts from deciding questions of national labor policy. The Court held in Garmon that when an activity is arguably subject to §7 or 8 of the [NLRA] the States as well as the Federal Courts must defer to the exclusive competence of the NLRB (359 U.S.C. 245, 79 S.Ct. at 779-780) at 1233. "This has remained the basis for determining the extent to which State and Federal Courts must defer to the primary jurisdiction of the NLRB." *Sears Roebuck & Co., v. Carpenters*, (1978) 436 U.S.C. 180. 191-199, 98 S.Ct. 1745, 56 L. Ed. 2d 209.

Local 12 filed unfair labor practices with the NLRB alleging that a valid collective bargaining agreement existed and McNeff was in violation of the agreement. The NLRB found that there was no violation of the Act since there was never an enforceable collective bargaining agreement.

The ligation herein involves the same issues, (1) is the Agreement valid and (2) if so is McNeff in violation of the

Agreement, considered by the NLRB. Therefore, under Garmon, the court is compelled to defer to the NLRB's decision.

In accord are two recent decisions, *South Prairie Construction Company v. Local NO. 627*, 425 U.S. C. 800, 96 S. Ct. 1842 (1976) and *Waggoner v. R. McGray, Inc.*, 607 F. 2d 1229 (9th Cir. 1979).

In *South Prairie* the Circuit Court of Appeals for the District of Columbia found that the union was the majority representative of *South Prairie's* employees. The Court reversed noting that the circuit court's action was "incompatable with the orderly function of the process of judicial review." *NLRB v. Metropolitan Ins. Co.* 380 U.S. 438, 444, 85 S. Ct. 1061, 1064, 13 L.Ed.2d 951, 955 (1965). The Court stated that the selection of an appropriate bargaining unit was largely within the discretion of the Board, whose decision, "if not final is rarely to be disturbed" *Packard Motor Co. v. NLRB* 390 U.S. 485, 491. 67 S.Ct. 789, 793, 91 L.Ed 2d 1040, 1050 (1947).

The issue presented herein is similar to that considered in *South Prairie*, whether Local 12 was freely designated by McNeff's employees in an appropriate collective bargaining unit. It is respectfully submitted that the court is required to defer to the NLRB's expertise in this area. To hold otherwise could only result in chaos. For example, the NLRB scheduled an election for McNeff's employees on January 23, 1980 to determine whether the employees wish to be represented by Local 12. Yet herein, plaintiffs ask the court to determine that the employees are already represented by Local 12.

In *Waggoner* the Ninth Circuit held that unfair labor practice issues fell within the primary jurisdiction of the NLRB while issues dealing with the terms of the collective bargaining agreement are exempted from the primary jurisdic-

tion principal at 1234-1235 citing *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971). Herein the court is faced with two issues, (1) is the contract valid and (2) if so is McNeff in violation of the contract.

The issue of whether this is a valid contract is not governed by the terms of the collective bargaining agreement and is within the primary jurisdiction of the NLRB. Thus, this court is without authority to determine if Local 12 was ever the duly authorized representative of McNeff's employees for purposes of collective bargaining.

IV. CONCLUSION

Based on the foregoing it is respectfully submitted that the complaint should be dismissed in its entirety and defendants awarded their costs and attorney's fees.

DATED: January 19, 1980.

Respectfully submitted,
STEVEN D. ATKINSON
By: Steven D. Atkinson
Steven D. Atkinson
Counsel for Defendant

EXHIBIT A.

United States of America, National Labor Relations Board.

PETITION

Case No: 21-RM-1967

Date Filed: 5-22-79

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

Purpose of this Petition (*If box RC, RM or RD is checked and a charge under Section 8(b)(2) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made*):

RM-REPRESENTATION (EMPLOYER PETITION)—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.

NAME OF EMPLOYER: JIM MC NEFF, INC.

EMPLOYER REPRESENTATIVE TO CONTACT: Jim McNeff

ADDRESS(ES) OF ESTABLISHMENT(S) INVOLVED (*Street and number, city, State, and ZIP Code*):

92-241 National Avenue, Mecca, California 92254

TYPE OF ESTABLISHMENT (*Factory, mine, wholesaler, etc.*): Engineering Subcontractor

Unit Involved (*In UC petition, describe PRESENT bargaining unit and attach description of proposed classification*):

All regular and part-time employees performing work covered by the Operating Engineers Agreement

All other employees including guards and supervisors as defined in the Act.

NUMBER OF EMPLOYEES IN UNIT:
PRESENT: 2

Request for recognition as Bargaining Representative was made on September 15, 1978.

NAME: THE INTERNATIONAL UNION OF OPERATING ENGINEERS

ADDRESS: 3055 Wilshire Boulevard, Los Angeles, CA 90010

DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY (*Show month, day, and year*): June 15, 1980

IS THERE NOW A STRIKE OR PICKETING AT THE EMPLOYERS ESTABLISHMENT(S) INVOLVED: NO XX

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

JIM MC NEFF, INC.
(Steven D. Atkinson)
/s/ Steven D. Atkinson, Attorney

Address 1300 Dove Street, Second Floor, Newport Beach, CA 92660 (714) 752-1165.

EXHIBIT B.

United States of America, National Labor Relations Board.

CHARGE AGAINST EMPLOYER

Case No.: 21-CA-17870

Date Filed: 6-4-79

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer: Jim McNeff, Inc.; Jim McNeff Trucking and Equipment Rental, joint employer

b. Number of Workers Employed

c. Address of Establishment (Street and number, city, State, and ZIP code): 92-241 National Avenue Mecca, California 92254.

d. Employer Representative to Contact: Steven D. Atkinson.

e. Phone No.: (714) 752-1165

f. Type of Establishment (Factory, mine, wholesaler, etc.): Engineering Subcontractor

g. Identify Principal Product or Service:

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (5) of the National Labor Relations Act and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.):

The Employer has repudiated, and has failed to comply with its agreement with the Union.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number): Local No. 12, International Union of Operating Engineers.

4a. Address (Street and number, city, State, and ZIP code): 3055 Wilshire Boulevard, Third Floor, Los Angeles, California 90010.

4b. Telephone No.: 380-4120

5. Full Name of National or International Labor Organization of Which it is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization): International Union of Operating Engineers, AFL-CIO

C. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

REICH, ADELL, CROST & PERRY, PLC, Attorney

By /s/ Julius Reich
Julius Reich

Address: 501 Shatto Place, Suite 100, Los Angeles, CA 90020, 386-3860

June 1, 1979.

ITEM 8.
Dismissal of Unfair Labor Practice Charge by Regional Director of Board.

(By Reference to Petition for Writ of Certiorari.)

(Text of NLRB Dismissal Letter appears at Appendix D of Petition for Writ of Certiorari.)

ITEM 9.
Denial of Appeal of Refusal by Regional Director to Issue Complaint.

(By Reference to Petition for Writ of Certiorari.)

(Text of NLRB Denial of Appeal Letter appears at Appendix E of Petition for Writ of Certiorari.)

ITEM 10.
Summary Judgment.

(By Reference to Petition for Writ of Certiorari.)

(Text of Summary Judgment appears at Appendix B of Petition for Writ of Certiorari.)

ITEM 11.
Reporter's Transcript of Proceedings.

(By Reference to Petition for Writ of Certiorari.)

(Text of Reporter's Transcript of Proceedings appears at Appendix C of Petition for Writ of Certiorari.)

ITEM 12.
Opinion of United States Court of Appeals for the Ninth Circuit.

(By Reference to Petition for Writ of Certiorari.)

(Text of Opinion of United States Court of Appeals for the Ninth Circuit appears at Appendix A of Petition for Writ of Certiorari.)

ITEM 13.
Notice of United States Supreme Court Order Granting Petition for Writ of Certiorari.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

July 2, 1982

James T. Winkler, Esq.
Atkinson, Andelson, et al.
911 Studebaker Road, Suite 250
Long Beach, California 90815

RE: Jim McNeff, Inc. v. Frank L. Todd, et al., No. 81-2150

Dear Mr. Winkler:

The Court today entered the following order in the above case:

> "The petition for a writ of certiorari is granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States."

Enclosed are memorandums describing the time requirements and procedures under the rules.

I have been instructed to inform you that Rule 34(a) is satisfied by having the initial sheet in the brief state the "Questions Presented" without more. Counsel should not have printed on this page the title of the case or any other descriptive matter. A sample sheet is enclosed.

The additional docketing fee of $100, Rule 45(a), is due and payable.

Very truly yours,
ALEXANDER L. STEVAS, Clerk
By /s/ June M. Hoffman
(Miss) June M. Hoffman
Assistant Clerk

Enclosures

Office - Supreme Court, U.S.
FILED
JUN 17 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2150
IN THE

Supreme Court of the United States

October Term, 1981

JIM MCNEFF, INC., a California Corporation,
Petitioner,

vs.

FRANK L. TODD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION.

WAYNE JETT,*
JETT, CLIFFORD & LAQUER,
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Suite 420,
Los Angeles, Calif. 90010,
(213) 380-2082,
Counsel for Respondents.
**Counsel of Record.*

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented.

1. Is a Section 8(f) agreement enforceable as a contract in a Section 301 suit before the union achieves majority status as representative of the employees covered by the agreement?

2. Is a Section 8(f) agreement rendered void because the employer signed the agreement in order to remain eligible for work on a construction jobsite where the general contractor and the union had agreed to a union signatory subcontracting clause?

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No. 81-2150

IN THE

Supreme Court of the United States

October Term, 1981

JIM MCNEFF, INC., a California Corporation,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

BRIEF IN OPPOSITION.

Respondents Frank L. Todd, et al., pray that the petition for a writ of certiorari to review the decision issued on February 8, 1982, by the U.S. Court of Appeals for the Ninth Circuit be denied. The decision of the Court of Appeals is officially reported at 667 F.2d 880.

Statement of the Case.

Jim McNeff, Inc. ("McNeff, Inc.") signed a collective bargaining agreement ("Agreement") with the International Union of Operating Engineers, Local Union No. 12 ("Local 12") on September 13, 1978, after being told by a representative of Local 12 and a superintendent of the general contractor on a construction project that McNeff, Inc. would be required to sign the Agreement in order to continue performing work as a subcontractor on the project. After signing the Agreement, the President of McNeff, Inc. complied with the Agreement by informing all three employees that the Agreement would require the employees to join

Local 12 as a condition of continued employment. All three employees signed documents necessary to join Local 12 and were dispatched by Local 12 as employees covered by the Agreement on the same day.

The Agreement obligated McNeff, Inc. to report all hours of employment and pay contributions at specified hourly rates to the Operating Engineers Health & Welfare Fund, Operating Engineers Pension Trust, Operating Engineers Vacation-Holiday Savings Trust and Operating Engineers Training Trust (the "Trusts") on behalf of each employee covered by the Agreement. From the signing of the Agreement until March, 1979, McNeff, Inc. further complied with the Agreement by filing monthly report forms furnished by the Trusts, but falsely reporting that "no members of this craft were employed during this month."

In March, 1979, a representative of the Trusts requested access to the payroll records of McNeff, Inc. for the purpose of performing an audit. When McNeff, Inc. eventually refused to permit the audit, the Trustees filed a complaint in this action on April 26, 1979. The Trustees obtained access to the required payroll records through pretrial discovery proceedings in this action. When performed, the payroll audit covered an interval from the signing of the Agreement on September 13, 1978, through April 30, 1979. The amount of fringe benefit contributions, liquidated damages for late payment, and audit expense found to be due under the Agreement for that interval was $5,316.79.

A motion for summary judgment was filed on behalf of the Trusts seeking recovery of the amount shown to be due by the audit. McNeff, Inc. sought to avoid the summary judgment by arguing that the Agreement was unenforceable for two reasons: (1) the Trusts had not proved that Local 12 had achieved a majority status among covered employees; and (2) the Agreement was signed by McNeff, Inc.

under coercion by Local 12. McNeff, Inc. also informed the district court that the General Counsel of the National Labor Relations Board ("NLRB" or "Board") had declined to issue a complaint against McNeff, Inc. based on a refusal to bargain charge filed by Local 12 under Section 8(a)(5) of the National Labor Relations Act ("Act"), and that McNeff, Inc. had filed a petition for a union representation election with the NLRB, but that the election results had not been certified at the time of hearing on summary judgment. On February 11, 1980, the district court entered summary judgment for the Trusts in the full amount shown to be due by the payroll audit covering the interval from September 13, 1978, through April 30, 1979, plus attorneys' fees.

On the employer's appeal, the U.S. Court of Appeals for the Ninth Circuit held that the Agreement signed by McNeff, Inc. and Local 12 pursuant to Section 8(f) of the Act is judicially enforceable as a contract obligation until an effective repudiation of the Agreement. The Court of Appeals further held that the conduct of McNeff, Inc. "enjoying the benefits of a pre-hire agreement and misleading the union as to the employer's intention of never performing its obligations" did not constitute an effective repudiation. (Pet. App., p. 8.) In *dictum*, the Court of Appeals observed that the majority status of Local 12 would become relevant only if an effective repudiation had occurred, and then would be relevant only insofar as prior attainment of majority status would bar a subsequent repudiation. (Pet. App., pp. 6-7.)

REASONS FOR DENYING THE WRIT.

Summary.

The decision of the Court of Appeals provides judicial enforcement for Section 8(f) agreements during the contract interval occurring before an effective repudiation by the signatory employer. This holding is supported by the previously stated views of this Court, is in accord with results reached in decisions by the Eighth Circuit and the Tenth Circuit, and is in accord with the language and legislative intent of the statute.

In addition, the Court of Appeals held on the specific facts of this case that the conduct of McNeff, Inc. did not constitute an effective repudiation of the Agreement with Local 12. This holding is supported by the factual record, and does not present a question of significance for review by this Court.

Finally, without deciding whether Local 12 used "coercion" to obtain execution of the Agreement by McNeff, Inc., the Court of Appeals held that an employer has a sufficient remedy for a coerced agreement through repudiation, and that coercion is not a defense to judicial enforcement of a Section 8(f) agreement prior to repudiation.

This case does not raise the issue of whether a Section 8(f) agreement is judicially enforceable after the NLRB has certified the union's loss of a representation election. The complaint in this case sought enforcement of the Agreement for the period covered by the payroll audit, which ended April 30, 1979. At that time, no petition for election had been filed by the employer, and certainly no election results had been certified by the NLRB.

Likewise, this case does not raise the issue of whether a union may obtain a Section 8(f) agreement by picketing an employer, because no picketing occurred. McNeff, Inc.

voluntarily signed the Agreement in order to obtain the benefits of the Agreement by remaining eligible for work as a subcontractor for a general contractor with a union signatory subcontracting agreement.

ARGUMENT.

I.

The Court of Appeals Correctly Held That a Section 8(f) Agreement Is Judicially Enforceable Until Repudiated.

Determining whether an agreement permitted by Section 8(f) can be repudiated by either party involves statutory interpretation. When interpreting any statute, the language of the statute is conclusive in the absence of a clearly expressed legislative intention to the contrary. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056 (1980). The express language of Section 8(f) (Pet., pp. 3-4) authorizes a construction employer "to make an agreement" with a union, and says nothing specifically about "repudiation" of such an agreement. However, the last proviso of Section 8(f) states that any such agreement "shall not be a bar to a petition filed pursuant to Section [9(c) or 9(e) of the Act]." 29 U.S.C. § 158(f). Thus, the only avenue for repudiation within the language of the statute is contained in the context of a petition for a union representation election filed with the NLRB by the employees or the employer.

The legislative history of Section 8(f) provides no basis for broadening the means for repudiating prehire agreements beyond the petition process provided by the language of the statute. The relevant legislative intent has been expressed by this Court as follows:

> "There were two aspects peculiar to the building trades that Congress apparently thought justified the use of pre-hire agreements with unions that did not represent a majority of the employees:
>
> 'One reason for this practice is that *it is necessary for the employer to know his labor costs* before

> making the estimates upon which his bid will be based. A second reason is that *the employer must be able to have available a supply of skilled craftsmen* ready for quick referral.' " (Emphasis added.) *NLRB v. Local Union No. 103, Ironworkers* ("*Higdon*"), 434 U.S. 335, 348, 98 S.Ct. 651, 659 (1978).

Cf., Pet. App., pp. 3, 7, 8. See, also, *Pacific Northwest Chapter v. NLRB*, 654 F.2d 1301, 1309, 1311 (9th Cir. 1981); *affirmed sub nom. Woelke & Romero Framing, Inc. v. NLRB*, ____ U.S. ____, 50 USLW 4538 (May 24, 1982). Obviously, if either the employer or the union could repudiate by simply breaching or disavowing a Section 8(f) agreement at any time before majority status is achieved, the congressional purpose of enabling employers to obtain binding commitments concerning wages and skilled workmen for use in preparing competitive bids for construction contracts would not be achieved.

Accordingly, in *Higdon* this Court recognized that a Section 8(f) agreement is "voidable", 434 U.S. at 341, 98 S.Ct. at 655-56, and acknowledged only the rights of the employees and the employer to petition for an election under Section 9 of the Act as the appropriate avenues for repudiating the agreement.[1]

The decision of the Court of Appeals that a Section 8(f) agreement is binding and judicially enforceable finds ad-

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[1]This Court's statements in *Higdon* are as follows:

(1) "The employer and its employees — and the union itself for that matter — may call for a bargaining representative election at any time." 434 U.S. at 345, 98 S.Ct. at 657.

(2) "The proviso expos[es] unions with prehire agreements to inquiry into their majority standing by elections under Section 9(c) . . ." *Id.*

(3) "Hence the proviso that an election could be demanded despite the prehire agreement." 434 U.S. at 349, 98 S.Ct. at 659.

ditional support in an analogy provided by this Court in the *Higdon* decision. In explaining that Section 8(f) is not rendered meaningless by the Court's holding that picketing to enforce prehire agreements is limited by Section (b)(7) of the Act, the Court refers to a "comparable situation . . . concerning hot cargo clauses . . . permitted . . . by Section 8(e) . . ., but which cannot be enforced by picketing." 434 U.S. at 349, 98 S.Ct. at 659-60, n. 11. In that "comparable situation", hot cargo clauses are judicially enforceable. See, *Woelke & Romero, Inc. v. NLRB, supra*, ___ U.S. ___, 50 USLW at 4540-41.

Thus, neither the express language of Section 8(f), nor its legislative history, nor the *Higdon* decision supports the petition's arguments that agreements made under Section 8(f) are completely nonbinding and may be avoided by simple breach of their terms. The Court of Appeals merely gave careful and logical effect to views previously expressed by this Court.

II.

The Repudiation Issue Presented by This Case Is Limited to the Sufficiency of the Employer's Conduct to Constitute an Effective Repudiation of the Section 8(f) Agreement.

The Court of Appeals found that McNeff, Inc. had retained the benefits of the Agreement with Local 12 while breaching its terms, and concluded that such conduct was not an effective repudiation of the Agreement. The Trustees' motion for summary judgment sought and obtained enforcement of the Agreement for the interval covered by the payroll audit ending April 30, 1979. The Court of Appeals was not called upon to specify what more McNeff, Inc. might have done to cut short its contract obligations by repudiation prior to that date.

Neither was the Court of Appeals required to determine whether the November 17, 1980, certification by the NLRB that Local 12 "is not the exclusive representative" of the operating engineer employees of McNeff, Inc. amounted to an effective repudiation which terminated the employer's obligations under the Agreement on that date. Such a result is certainly not foreclosed by the decision of the Court of Appeals and, thus, is left for decision in another case (*e.g.*, a case seeking enforcement of the Agreement through November 17, 1980, and thereafter). In this light, the assertion in the petition that the decision of the Court of Appeals renders meaningless the election process of the Act is unwarranted.[2]

III.

The Record in This Case Does Not Show That Local 12 Used Unlawful Coercion in Obtaining Execution of the Section 8(f) Agreement by McNeff, Inc.

The petition asks the Court to "assume" that Local 12's conduct amounted to coercion so that the Court may then decide whether the presence of such "assumed" coercion

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[2]Likewise, the assertion in the petition that decisions in the Eighth Circuit and Tenth Circuit make the election process of the NLRB "totally irrelevant" is overbroad and erroneous. Neither *Contractors, etc. v. Associated Wrecking Company*, 638 F.2d 1128 (8th Cir. 1981), nor *New Mexico District Council of Carpenters v. Mayhew Company*, 664 F.2d 215 (10th Cir. 1981), involved enforcement of a Section 8(f) agreement for a term after the date of an NLRB certification of election results. Clearly, the decisions of the Eighth, Ninth and Tenth Circuits leave room for a proper accommodation of the NLRB election process in future cases.

On the other hand, the erroneous decision in *Baton Rouge Building and Construction Trades Council v. E.C. Schafer Construction Company, Inc.*, 657 F.2d 806 (5th Cir. 1981), makes Section 8(f) largely meaningless by declaring prehire agreements to be unenforceable until union majority status is established. An "agreement" has no meaning if the parties cannot rely upon its terms. The very essence of Section 8(f) authorizes agreements to be made before union majority status has been or can be established.

would cause the Agreement to be judicially unenforceable. (Pet., p. 7, n. 3.) Such a hypothetical factual record is not a proper basis for review and decision by this Court.

The record shows that McNeff, Inc. signed the Agreement after being told by a representative of Local 12 and a representative of a general contractor that McNeff, Inc. could continue work as a subcontractor on the construction project of the general contractor only if McNeff, Inc. would sign an agreement with Local 12. (Pet., p. 4.) This Court recently stated:

> "When a union obtains a subcontracting clause from a general contractor, subcontractors frequently attempt to ensure that they remain eligible for work by entering into a Section 8(f) agreement — known as a prehire agreement — with the union." *Woelke & Romero, Inc. v. NLRB, supra*, ____ U.S. ____, 50 USLW at 4543.[3]

The decision by McNeff, Inc. to sign the Agreement was entirely voluntary in the sense that the employer could freely choose to sign the Agreement or discontinue working as a subcontractor on the construction project. A voluntary act is not distinguished from a coerced one merely by the absence or presence of economic considerations. Such considerations are undoubtedly present whenever a Section 8(f) agreement is signed, which, as noted by this Court in *Woelke & Romero*, frequently occurs.

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[3]However, this Court expressly reserved "the question whether a union may picket to obtain a pre-hire agreement." *Id.*, n. 17. No picketing was involved in the signing of the Agreement by McNeff, Inc. and Local 12.

IV.

The Decision of the Court of Appeals Granting Judicial Enforcement of the Agreement Is Entirely Consistent With the Decision of the Board's General Counsel Declining to Charge a Violation of Section 8(a)(5) of the Act.

The premise of the petition that this case reflects important conflicts in national labor policy as administered by the NLRB, the Court of Appeals and this Court springs primarily from a misconception on the part of petitioner. That misconception is reflected in the petition's erroneous statement that the "pivotal question before the Court of Appeals was . . . the same question presented to this Court in [*Higdon*]." (Pet., p. 12.) Of course, the questions presented by the two cases are importantly different. This case presents the question whether a Section 8(f) agreement signed by an employer with a minority union is judicially enforceable in a Section 301 action. The question before this Court in *Higdon* was whether a minority union could picket *to enforce* a Section 8(f) agreement without the time limitations imposed by Section 8(b)(7)(C) of the Act on picketing for recognitional purposes. The Court affirmed the view of the Board that the signing of a Section 8(f) agreement does not enable a minority union to avoid the Section 8(b)(7)(C) limitation on picketing. *Higdon*, 434 U.S. at 346, 98 S.Ct. at 658.

This Court recognized in *Higdon* that, under the policies of the Act, the Board will not use its resources to seek enforcement of a collective bargaining agreement by pursuing government litigation under Section 8(a)(5) of the Act when the union party to the agreement does not represent a majority of the covered employees. Thus, in the absence of a majority union, no violation of public policy as expressed in Section 8(a)(5) occurs when an employer

breaches a Section 8(f) Agreement. *Higdon*, 434 U.S. at 344-45, 98 S.Ct. at 657-58. In this light, whether an employer may "repudiate" an agreement with a minority union without fear that the Board's General Counsel will issue a complaint charging violation of Section 8(a)(5) is a materially different concern from whether the employer may breach his consensual agreement without being subject to a judicial suit for enforcement.[4]

The Court of Appeals recognized this distinction and concluded that Congress intended a Section 8(f) agreement to be binding and judicially enforceable, while at the same time intending that NLRB resources be reserved to prosecute breaches of the agreement as violations of public policy only after the union has demonstrated majority support among the covered employees.

Conclusion.

Based on the foregoing, the petition for a writ of certiorari should be denied.

Dated: June 15 1982.

Respectfully submitted,

WAYNE JETT,*
JETT, CLIFFORD & LAQUER,
Counsel for Respondents.
**Counsel of Record.*

---

[4]The General Counsel's dismissal of Local 12's Section 8(a)(5) charge amounted to a ruling that the existing agreement would not be a bar to the petition for election filed by McNeff, Inc. since majority status had not been shown adequately by Local 12. This is in accord with the language of Section 8(f) and the law under Section 8(a)(5). See, *Higdon*, 434 U.S. at 343-45, 98 S.Ct. at 656-57. The dismissal of a Section 8(a)(5) charge does not eradicate the Section 8(f) agreement as a nullity, as the petition urges, but merely allows the election processes of the Board to operate as Section 8(f) provides.

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FILED
JAN 29 1982
ALEXANDER L. STEVAS
CLERK

No. 81-2150

IN THE

Supreme Court of the United States

October Term, 1981

JIM MCNEFF, INC., a California corporation,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

REPLY AND SUPPLEMENTAL BRIEF.

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No. 81-2150

IN THE

Supreme Court of the United States

October Term, 1981

JIM MCNEFF, INC., a California corporation,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

REPLY AND SUPPLEMENTAL BRIEF.

On May 7, 1982, petitioner filed a petition for a writ of certiorari to review the decision of the U.S. Court of Appeals for the Ninth Circuit in *Todd v. McNeff*, 667 F.2d 800. On June 15, 1982, respondent filed a brief in opposition. Pursuant to Rule 22.5 of the Rules of the Supreme Court of the United States, petitioner hereby files this reply brief to respondent's brief in opposition.

After the petition was filed, this Court issued its decision in *Woelke & Romero Framing, Inc. v. N.L.R.B.*, ... U.S. ...., 50 USLW 4538 (May 24, 1982). Pursuant to Rule 22.6 of the Rules of the Supreme Court of the United States, petitioner hereby files this supplemental brief to comment on this new case.

The Decision Below Conflicts With This Court's Decision in *Woelke & Romero Framing, Inc. v. N.L.R.B.*, ... U.S. ...., 50 USLW 4538 (May 24, 1982).

In *Woelke & Romero*, this Court held that the construction industry proviso to Section 8(e) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(e), shelters union signatory subcontracting clauses that are sought or negotiated in the context of a collective bargaining relationship.

This Court acknowledged that this encourages top-down organizing even though "one of the central aims of the 1959 amendments to the Act was to restrict the ability of unions to engage in top-down organizing campaigns." *Woelke & Romero*, 50 USLW at 4543. However, this Court was quick to point out that this exception was limited and delineated several safeguards against other types of top-down organizing:

> When a union obtains a subcontracting clause from a general contractor, subcontractors frequently attempt to ensure that they remain eligible for work by entering into a § 8(f) agreement — known as a prehire agreement — with the union. If they do so, however, § 8(f) expressly states that their employees may challenge the union's representative status by filing an election petition with the Board. And the subcontractors themselves, if they do not have a stable workforce among whom the union has secured a majority, may be free to repudiate the agreement *at any project* on which the union has not demonstrated that it represents a majority of their employees. See *NLRB v. Local 103, Iron Workers*, 434 U.S. 335 (1978); *Giordano Construction Co.*, 256 NLRB No. 10 (May 18, 1981), 107 LRRM 1164, 1165-1166. (Emphasis added) *Woelke & Romero*, 50 USLW at 4543.

By adopting the decision of the National Labor Relations Board ("Board") in *Giordano Construction Co.*, this Court again adopted the Board's interpretation of national labor policy concerning the statutory construction of Section 8(f) of the Act. Not only does a union have to establish majority support to enforce an 8(f) prehire agreement, it must do so at *each project* if the employer does not "have a stable workforce" which stays with the employer from job to job.

This Court has thus adopted the Board's position that employers and unions are free to utilize the procedures of Section 8(f) to obtain union-referred workmen on certain jobsites but that such a practice does not bind the employer to the terms of the agreement on jobsites where the employees selected do not wish union representation.[1]

These "union" and "non-union" jobsites can, and do, exist at the same time. The decision of the Court below does not allow for this jobsite by jobsite approach adopted by the Board and this Court. The Court below held that an employer must notify the union that it is repudiating the agreement before such a minority agreement would be held unenforceable. This "all or nothing" approach is based on an analysis which does not accept the Board's position, adopted by this Court, that an 8(f) agreement "is merely a preliminary step that contemplates further action for the development of a full bargaining relationship." *NLRB v. Local Union No. 103, Iron Workers (Higdon Contracting Co.)*, 434 U.S. 335 at 345 (1978).

Despite the assurances of this Court in *Woelke & Romero* that top-down organizing is limited by safeguards under Section 8(f) of the Act, minority prehire agreements are, nevertheless, being enforced, in varying degrees, in the

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[1]The Board articulated this policy in its decision in *Dee Cee Floor Covering, Inc.*, 232 NLRB 421.

Eighth, Ninth and Tenth Circuits. This Court should take this opportunity to restore the safeguards assured construction employees and employers in this Court's *Woelke & Romero* decision.

Reply to Respondent's Brief in Opposition.

Respondent presented the issue to this Court of whether an 8(f) agreement was void if a contractor signed an agreement to remain eligible for work "where the general contractor and the union had agreed to a union signatory subcontracting clause." Respondent's Brief in Opposition, page i. Respondent also alleged that McNeff, Inc. signed the agreement in issue to remain "eligible for work as a subcontractor for a general contractor with a union signatory subcontracting agreement." Respondent's Brief in Opposition, page 5.

It is respectfully submitted that there is no evidence in the records of this case that the general contractor involved had agreed to a union signatory subcontracting clause and petitioner is not aware of such a fact. In any event, this Court need not decide whether the conduct of the union involved amounted to coercion because the matter was not resolved in the first instance by the Court below. This Court also need not pass on what conduct constitutes coercion sufficient to destroy the voluntary adherence to Section 8(f) agreements required by this Court in *Higdon*. The only issue before this Court, in this regard, is whether the Court below, as a matter of law, properly refused to decide the factual issue.

Respondent also attempted to reconcile the decision of the Court below with the decision of the Board's General Counsel not to proceed on the same set of facts under Section 8(a)(5) of the Act as "entirely consistent" positions. Respondent argued that the issues presented to this Court

in *Higdon* involved Board unfair labor practice proceedings and that such issues are "materially different" from the question of whether a Section 8(f) minority agreement "is judicially enforceable in a Section 301 action." Respondent then stated that the Court below "recognized this distinction" and intended minority Section 8(f) agreements to be enforceable under Section 301 despite the refusal of the Board to enforce them in unfair labor practice proceedings. Respondent's Brief in Opposition, pages 11-12.

The Court below recognized no such distinction. This rationale was used only by the Courts of Appeals for the Eighth and Tenth Circuits. The Court below specifically rejected the approach, stating:

> There is no reason to restrict the statements in *Higdon* about § 8(f) agreements generally to unfair labor practices cases. The opinion is written much more broadly than that view allows. *Todd v. McNeff*, 667 F.2d at 803.

The Court below simply formulated its own version of national labor policy by adopting policies which have been rejected by the Board.

Respondent's attempt to justify the maverick decision of the Court below by superimposing the rationale of the Eighth and Tenth Circuits, actually highlights the conflict in the Courts of Appeals[2] and the conflict between the Board and the Court below.

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[2]Respondent further acknowledged the conflict in the Courts of Appeals when it noted the conflicting view of the Court of Appeals for the Fifth Circuit and simply labled that Court's decision as "erroneous". Petitioner's Brief in Opposition, page 9, note 2.

Conclusion.

Based on the foregoing the writ of certiorari should be granted.

Los Angeles, California.

Dated: June 24, 1982.

Respectfully submitted,

JAMES T. WINKLER,

STEVEN D. ATKINSON,

Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2150

JIM MCNEFF, INC.,

Petitioner,

v.

FRANK L. TODD, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND BY THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, FOR LEAVE TO FILE A BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENTS

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the Building and Construction Trades Department, AFL-CIO, hereby move for leave to file a brief *amici curiae* in the above-styled case in support of the position of respondents.

The AFL-CIO is a federation of 99 national and international unions having a total membership of 14,500,000

working men and women. The Building and Construction Trades Department, AFL-CIO, is composed of 15 national and international unions representing 4,000,000 construction workers. This case raises the question of whether "prehire" agreements expressly made lawful in the construction industry by § 8(f) of the National Labor Relations Act, as amended, are enforceable in court or are, as the petitioner contends, without any binding effect. In practical terms, as this case shows, resolution of that question will determine whether or not employers are free, after labor has been performed under a § 8(f) agreement, to reneg on their promise to pay for that labor as provided in the agreement. Thus, the issue presented here is of substantial moment and it is for that reason that the AFL-CIO and the Building Trades Department, AFL-CIO, seek leave to state their views.

The correct interpretation of the Act in our view is that a § 8(f) agreement is binding until it has been terminated by the union's loss of the election authorized in the proviso to § 8(f). As we show in the attached brief *amici curiae*, the alternative view which would allow a party to abrogate the prehire agreement merely by so notifying the other party has no basis in the statutory language, and is contrary to the purposes of both § 8(f) and § 301. Petitioner resists enforcement of the agreement also on the ground that he entered into it under "duress." But, as we also show, the § 8(f) agreement here was entered into under conditions envisioned and privileged by Congress, as confirmed by this Court's decision in *Woelke & Romero, Inc. v. NLRB*, —— U.S. ——, 50 L.W. 4538 (May 24, 1982).

CONCLUSION

For the above stated reasons, this motion for leave to file a brief *amici curiae* should be granted.

Respectfully submitted,

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CLERK

No. 81-2150

IN THE

Supreme Court of the United States

October Term, 1981

JIM MCNEFF, INC., a California corporation,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF PETITIONER ON THE MERITS.

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Questions Presented.

1. Is a prehire agreement authorized by Section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f), enforceable in a suit brought under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, absent a showing that the union signatory to the agreement is the majority representative of the employer's employees?
2. Is a prehire agreement authorized by Section 8(f) of the National Labor Relations Act enforceable if it was entered into by an employer because of coercion by a union?

List of Parties to Proceeding Below.

Pursuant to Rule 34.1(b) of the Rules of the Supreme Court of the United States, a list of the parties in the proceeding below is submitted:

Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, John C. Maxwell, Dale I. Vawter, Jerald B. Laird, William Cobb, Jr., C.W. Poss, Verne W. Dahnke, Alexander Rados, William A. Floyd and Jerry Toll, each in his respective capacity as Trustee of the Operating Engineers Health & Welfare Fund; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, John C. Maxwell, William C. Waggoner, Dale I. Vawter, C.V. Holder, William A. Cobb, Jr., Alexander Rados, William A. Floyd, Edwin Kalish, Steve Billy, Winton Kemmis and Dean Sweeney, Jr., each in his respective capacity as Trustee of the Operating Engineers Pension Trust; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, Jerry Toll, William C. Waggoner, C.I.T. Johnson, Dale I. Vawter, Don McCoy, William A. Cobb, Jr., Alexander Rados, William A. Floyd and Dean Sweeney, Jr., each in his

respective capacity as Trustee of the Operating Engineers Vacation-Holiday Savings Trust; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, Robert Lytle, Dale I. Vawter, Kenneth J. Bourguignon, Verne W. Dahnke, Winton Kemmis, William A. Floyd and Don MacIntosh, each in his respective capacity as Trustee of the Operating Engineers Training Trust,

Appellees below,

Jim McNeff, Inc.,

Appellant below.

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No. 81-2150

IN THE

Supreme Court of the United States

October Term, 1981

JIM MCNEFF, INC., a California corporation,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

BRIEF OF PETITIONER ON THE MERITS.

Petitioner, Jim McNeff, Inc., a California corporation, respectfully requests that the judgment of the U.S. Court of Appeals for the Ninth Circuit which was entered in this proceeding on February 8, 1982,[1] be reversed and remanded.

OPINIONS AND ORDERS BELOW.

The Judgment and Opinion of the U.S. Court of Appeals for the Ninth Circuit, which was entered in this matter on February 8, 1982, is styled, *Frank L. Todd, et al. v. Jim McNeff, Inc., a California corporation*, and is reported at

[1]The within matter was numbered Case No. 80-5214 in the Court of Appeals. It is reported at 667 F.2d 800. Jim McNeff, Inc. was the Defendant-Appellant below, and Frank L. Todd, *et al.* were the Plaintiffs-Appellees below.

667 F.2d 800. It appears as Appendix A to the Petition for Certiorari.

The U.S. District Court for the Central District of California entered its Order on February 11, 1980, which is not officially reported. The Order appears as Appendix B to the Petition for Certiorari.

The Findings of Fact and Conclusions of Law of the U.S. District Court for the Central District of California were made on the record in oral argument on February 4, 1980. The transcript appears as Appendix C to the Petition for Certiorari.

On July 10, 1979, the Regional Director of Region 21 of the National Labor Relations Board issued a dismissal letter refusing to issue complaint against Jim McNeff, Inc. based on a charge filed by the International Union of Operating Engineers, Local No. 12. The document appears as Appendix D to the Petition for Certiorari.

On November 8, 1979, the General Counsel of the Board, by letter, denied the appeal of the action of the Regional Director. The document appears as Appendix E to the Petition for Certiorari.

On November 17, 1980, the Board issued a Supplemental Decision and Certification of Results of Election which is not officially reported. The Decision appears as Appendix F to the Petition for Certiorari.

JURISDICTION OF THE SUPREME COURT.

The judgment and opinion of the U.S. Court of Appeals for the Ninth Circuit was entered on February 8, 1982. No petition for rehearing, or for further hearing before the full Court, has been filed. The Petition for Certiorari was filed on May 7, 1982.

The jurisdiction of the U.S. Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED.

United States Code, Title 29:

§ 185(a) "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

§ 158(a)(5) "It shall be an unfair labor practice for an employer —

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

§ 158(f) "It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by an action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants

for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)."

STATEMENT OF THE CASE.

Statement of Facts.

Jim McNeff, Inc. ("McNeff, Inc.") is an employer engaged in business in the construction industry. In September of 1978, McNeff, Inc. was engaged in business as a subcontractor on a jobsite in Southern California. McNeff, Inc. employed three employees on the jobsite, none of whom were members of the International Union of Operating Engineers, Local No. 12 ("Union"). McNeff, Inc. was not signatory to any agreement with the Union. (Pet., Appendix A, p. 2)

On September 13, 1978, a representative of the Union approached Jim McNeff, President of McNeff, Inc., and informed him that McNeff, Inc. would have to sign the Master Labor Agreement ("Agreement") with the Union or leave the job. McNeff refused the ultimatum. (Pet., Appendix A, p. 2)

The Union representative left and returned with the general contractor who also informed McNeff that he would have to sign the Agreement if he wanted to continue on the site. McNeff then relented and signed the Agreement. He did not read the Agreement or intend to abide by its terms.

McNeff then had all three nonunion employees sign union cards the same day. (Pet., Appendix A, p. 2)

McNeff, Inc. never complied with the Agreement. From October, 1978 to March, 1979, the union trust funds sent reports to McNeff, Inc. for their completion and return. McNeff, Inc. returned the forms each month and wrote upon them that "no members of this craft were employed during this month." (Pet., Appendix A, p. 2)

One month after the first form was returned to the trust fund, the trustees requested an audit of McNeff, Inc.'s books. An audit was eventually conducted and the trustees claimed $5,316.79 to be due the trusts. (Pet., Appendix A, p. 2)

Proceedings Below.

On April 26, 1979, trustees filed a breach of contract suit against McNeff, Inc. pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, in the Federal District Court for the Central District of California.

On May 22, 1979, McNeff, Inc. filed a petition with the National Labor Relations Board ("Board") seeking a representation election among all of its employees performing operating engineer work as delineated in the Agreement.

On June 4, 1979, the Union filed a charge with the Board against McNeff, Inc. alleging that McNeff, Inc. had violated Section 8(a)(5) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(a)(5), by repudiating and failing to comply with the Agreement.

On July 10, 1979, the Regional Director of Region 21 of the Board, by letter, dismissed the Union's charge and refused to enforce the Agreement, noting that a full collective bargaining relationship had not been established. The Director refused to hold that the Union had perfected a full collective bargaining relationship on the basis of the union

membership of the three employees who were instructed to join the Union.

The Union appealed the action of the Regional Director to the General Counsel of the Board. On November 8, 1979, the General Counsel denied the appeal. The General Counsel noted that McNeff, Inc. was forced to sign the Section 8(f) agreement.

On January 23, 1980, an election among McNeff, Inc.'s operating engineer employees was conducted by the Board. The results were not conclusive at that time because of official challenges to certain ballots and the filing by the Union of objections to the conduct of the election.

The trustees filed a motion for summary judgment and McNeff, Inc. filed a cross-motion for summary judgment in the trustee action. On February 4, 1980, counsel for trustees and McNeff, Inc. were heard on their motions in open court.

On February 11, 1980, the district court entered its Order granting the trustees' motion for summary judgment and denying defendant's motion for summary judgment. In the Summary Judgment Order the district court found that the trustees had shown entitlement to the judgment as a matter of law.

McNeff, Inc. appealed the decision to the Court of Appeals for the Ninth Circuit. On October 8, 1981, oral argument was held before the court in Los Angeles, California.

On November 17, 1980, the Board issued its Supplemental Decision and Certification of Results of Election, certifying that a majority of McNeff, Inc.'s employees did not vote for the Union and that the Union is not the bargaining representative of the employees.

On February 8, 1982, the court issued its judgment and opinion.

The Decision of the Court of Appeals Below.

The "major issue" of the case before the court was whether minority prehire agreements are enforceable in Section 301 litigation. The court reviewed the wide split of authority on this issue which has developed since this Court's decision in *N.L.R.B. v. Local Union No. 103, Iron Workers (Higdon Contracting Co.)*, 434 U.S. 335 (1978). The court reviewed the positions of the Eighth and Tenth Circuits, which have held minority prehire agreements to be enforceable in Section 301 litigation, and the contrary position of the Fifth Circuit which has held such agreements unenforceable until the union involved obtains majority status.

The court then opted for what it called the middle position. The court held that prehire agreements are enforceable despite a union's lack of majority status. However, the employer in such a circumstance can repudiate the agreement if the union has not achieved majority status. After such a repudiation the minority agreement is no longer enforceable. The court held that McNeff, Inc., as a matter of law, had not repudiated the Agreement and that the Agreement was therefore valid until the lawsuit was filed.[2] The court held that McNeff, Inc.'s noncompliance with the agreement did not constitute repudiation.

The court also rejected the position of McNeff, Inc. that this Court's decision in *Higdon* authorized only the voluntary acquisition of prehire agreements and that the agree-

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[2]The court apparently held that the filing of the suit constituted knowledge of the employer's repudiation as a matter of law and that liability was cut off at that point. In making this determination the court, *sub silentio*, found that the union had not obtained majority status because there could be no repudiation once majority status was achieved. The court did not otherwise address the issue of whether in fact the employees of McNeff, Inc. had designated the union as their majority representative.

ment was therefore not enforceable. The court specifically did not pass on whether the Union's conduct amounted to coercion.[3] The court held that such a resolution was not necessary because the issue of coercion can only be raised at the time of repudiation.

The court only mentioned that unfair labor practice charges had been filed in the matter and that the General Counsel had declined to prosecute the case on the ground that a full collective bargaining relationship had not been established. The court did not mention the outstanding election that had been conducted by the Board among McNeff, Inc.'s employees.

SUMMARY OF ARGUMENT.

1. This Court in *NLRB v. Local Union No. 103, Iron Workers (Higdon Contracting Co.)*, 434 U.S. 335 (1978), in review of a Board decision, examined the interrelation of Section 8(f) of the Act with Sections 8(a)(5) (involving refusal to bargain) and 8(b)(7)(C) (involving recognitional picketing). This Court held that an employer's duty to honor an 8(f) prehire agreement under Section 8(a)(5) is contingent on the union demonstrating its majority status. This Court also held that prehire agreements are likewise unenforceable in Section 301 litigation if the union fails to establish majority status.

2. Congress authorized prehire agreements as preliminary steps which do not become binding collective bargaining agreements until the union achieves majority status. This is based on the statutory policy protecting employee rights to designate their own representative for purposes of collective bargaining. Congress authorized the execution of

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[3]Petitioner does not request that this Court decide this issue. For purposes of argument, it will be assumed the Union's conduct amounted to coercion.

prehire agreements in order to allow employers (1) to have access to union-referred workmen for a quick supply of labor; and (2) to know the cost of labor in order to bid for projects. This Court held such agreements may be voluntarily honored. However, the court below is enforcing the terms of these agreements despite employee wishes, in circumstances where Congressional purpose has not been realized — where employers obtain their own workmen and make their bids based on noncontractual wage rates.

3. This Court has recognized that Section 8(f) is an exception to the rule that Congress intended to limit "top-down" organizing in its 1959 amendments to the Act. But this Court noted that Congress specifically limited the exception. Three times this Court has reviewed Section 8(f) and each time it has condemned "top-down" organizing and has limited the section's application.

4. This Court and the Board have held that prehire agreements may only be executed voluntarily and no element of coercion should be allowed. The court below, by refusing to entertain an affirmative defense concerning the voluntary execution of the agreement, is permitting unions to obtain prehire agreements by means condemned by Congress.

5. The Board does not enforce prehire agreements until the union demonstrates majority status and its policy has been upheld by this Court in *Higdon*. The enforcement of agreements by courts under Section 301 when they cannot be enforced in unfair labor practice proceedings is contrary to this Court's requirement that there be a uniform national labor policy.

6. The 1980 amendments to ERISA do not require the enforcement of minority agreements. The amendments do not refer to prehire agreements or to Section 8(f) of the Act.

This Court has rejected a similar argument that the amendments negate an affirmative defense challenging the legality of an agreement. The issue of the underlying enforceability of the agreement is obviously a crucial issue to be determined by a court.

ARGUMENT.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *N.L.R.B v. LOCAL UNION NO. 103, IRON WORKERS (HIGDON CONTRACTING CO.)*, 434 U.S. 335 (1978).

A. Issues Presented to This Court in *N.L.R.B. v. Local Union No. 103, Iron Workers (Higdon Contracting Co.)*, 434 U.S. 335 (1978).

This Court, in *N.L.R.B. v. Local Union No. 103, Iron Workers (Higdon Contracting Co.)*, 434 U.S. 335 (1978), reversed the decision of the Court of Appeals for the District of Columbia Circuit which had denied enforcement of a Board order. This Court adopted the Board's interpretation of Section 8(f) of the Act, to the facts of the case.

Courts have disagreed as to the applicability of the *Higdon* decision to suits brought pursuant to Section 301 to enforce the terms of prehire agreements.[4] To evaluate this issue it is necessary to retrace the steps which led to this Court's resolution of what constituted a continuing conflict between the Board and the Court of Appeals for the District of Columbia Circuit.

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[4]The Fifth and Eleventh Circuits have found prehire agreements to be unenforceable unless the union establishes that it had achieved majority status. *Baton Rouge Bldg. & Const. v. E.C. Schafer Constr.*, 657 F.2d 806 (5th Cir. 1981); *District Council v. McDowell Contractors*, 110 LRRM 2965 (11th Cir. 1982). The court below and the District of Columbia Circuit have held minority prehire agreements to be enforceable until the employer notifies the union that it is repudiating the agreement. *Welfare Fund v. Overhead Door Co.*, 681 F.2d 1 (D.C. Cir. 1982). The Eighth and Tenth Circuits have held them to be enforceable at all times. *Contractors, etc. v. Associated Wrecking Co.*, 638 F.2d 1128 (8th Cir. 1981); *New Mexico District Council, etc. v. Mayhew Co.*, 664 F.2d 215 (10th Cir. 1981). The Eighth Circuit has apparently modified its broad rule in *W.C. James, Inc. v. Oil, Chemical & Atomic Workers Int'l Union*, 646 F.2d 1292 (1981).

The conflict began in the Board's landmark decisions of *R.J. Smith Construction Co.*, 191 NLRB 693 (1971) and *Ruttmann Construction*, 191 NLRB 701 (1971).

Section 8(f) was added to the statute in the 1959 amendments to the Act. The *R.J. Smith* and *Ruttmann* decisions marked the Board's first in-depth analysis of Section 8(f) and its interrelation to Section 8(a)(5). This Court extensively commented on, and relied upon, these companion Board cases in its *Higdon* decision.

R.J. Smith.

The construction employer in *R.J. Smith* executed a minority prehire agreement but did not implement the terms of the agreement. The employer occasionally raised the rates of many of its employees without prior notice to the union. These rate increases did not bring the wage rates of the employees up to the rates set forth in the prehire agreement.

When the union discovered the employer's noncompliance, it filed a charge with the Board and the Board's General Counsel issued a complaint alleging that the employer had unilaterally changed contractual wage rates in violation of Section 8(a)(5) of the Act. At issue before the Board was the employer's conduct dating back six months (the Board's statute of limitations) before the original charge had been filed. *Id.* at 693 and 696.

"Unilateral change" is a term of art used by the Board which refers to an employer's changes in the employees' working conditions without prior notice to or bargaining with the employees' bargaining representative. This Court, in *Labor Board v. Katz*, 369 U.S. 736 (1962), agreed with the Board that an employer which granted "unilateral" wage increases "without having advised or consulted with

the union"[5] violated Section 8(a)(5) of the Act regardless of the employer's otherwise good faith in its bargaining relationship with the union.

The failure to comply with a contractual wage scale also constitutes unilateral action even if no actual "change" in the employer's operation occurs. In *R.J. Smith* the General Counsel and the union contended that the employer "unilaterally changed working conditions by failing . . . to put the contracts' requirements into effect . . ." *R.J. Smith*, 191 NLRB at 697. As a remedy, the government sought past as well as present compliance with the terms of the prehire agreement. *Id.* at 696.

The Administrative Law Judge before the Board found that the employer failed to adhere to the terms of the agreement and that its intentional noncompliance had been concealed from the union.[6] The Judge also found that the employer's various wage changes were implemented "without prior notice to, or bargaining with" the union. *Id.* at 697.

Despite these factual findings, the Judge held that the employer's unilateral conduct did not violate Section 8(a)(5) of the Act because the union did not represent a majority of the employees.

The Board, on review, agreed with the Judge. The Board analyzed the legislative history to Section 8(f) and the section's interrelation with Section 8(a)(5) of the Act. The Report of the House of Representatives Committee on Education and Labor, as quoted by the Board, was submitted to be the Congressional intent for enacting Section 8(f):

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[5] *Katz*, 369 U.S. at 745.

[6] "In short, without disclosing his design to the other contracting party, Smith sought to obtain benefits from the agreement without undertaking its obligations." *R.J. Smith*, 191 NLRB at 697 n. 6. *See also R.J. Smith*, at 697, n. 7.

> In the building and construction industry it is customary for employers to enter into collective-bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements sometimes apply to jobs which have not been started. *The practice of signing such agreements for future employment is not entirely consistent with Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired.* One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. The committee has determined that the object of validating the prehire agreement in the building and construction industry is sound and has chosen to accomplish this object by providing that a prehire agreement in that industry shall not constitute an unfair labor practice under the act. [Emphasis added by Board.][7]

The Board held that this legislative history reveals that Section 8(f) was enacted to "immunize employers in the construction industry from the strictures of Section 8(a) of the Act" when they enter into minority prehire agreements.[8] However, the Board held that the language of Section 8(f)

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[7] *R.J. Smith*, 191 NLRB at 694, citing H.R. Rep. No. 741, 86th Cong., 1st Sess., 1 Leg. Hist. 759, 777 (1959).

[8] It is important to note the portion of the legislative history emphasized by the Board in making its determination that Section 8(f) only immunizes the preliminary steps of a prehire agreement. This portion of the legislative history is usually omitted by courts which recite legislative history to support the proposition that prehire agreements are enforceable.

"clearly suggests the limits of its effect", noting especially the final proviso to the section:

> Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

In other industries the existence of a labor agreement bars the conducting of a representation election under the Board's "contract bar" rule because the agreement grants the union an "irrebuttable presumption" of majority status. No such presumption is afforded construction unions under prehire agreements and therefore minority prehire agreements cannot be a bar to an election. *R.J. Smith*, 191 NLRB at 695.

The Board concluded that the election proviso revealed Congressional intent to "immunize from liability only the preliminary contractual steps" of entering into prehire agreements. The Board emphasized that the proviso permits the testing of the union's majority status "at any time" in an election petition. Because majority status may be challenged at any time by the filing of an election petition, the Board reasoned that "it would be anomalous, indeed, to hold that Section 8(f) prohibits examination of those questions in the litigation of refusal-to-bargain charges." *Id.* at 694.

Applying this analysis, the Board dismissed the 8(a)(5) refusal to bargain charges and held, as correctly noted by the Board's dissenting members, that a minority prehire agreement "is effective only so long as both parties wish to adhere to it and may be ignored with impunity, as it was in the instant case, by either party at any time . . ." *Id.* at 695.

***Ruttmann* Case.**

In the companion case of *Ruttmann Construction*, 191 NLRB 701, the employer entered into a prehire agreement and complied with its terms on various construction projects. However, the employer then entered into another prehire agreement with a rival union for work on a selected jobsite. *Ruttmann*, 191 NLRB at 705.

Once again, this action was concealed from the first union. Two months after work began on the disputed project a business representative from the first union approached the employer and asked why the union had not been notified that the employer was working on the project. *Id.* at 706.

Nevertheless, the Board held this unilateral action to be privileged because the union did not establish its majority status at the disputed project. The Board held that entering into a prehire agreement "is merely a preliminary step that contemplates further action for the development of a full bargaining relationship." *Id.* at 702.

Court Review of *R.J. Smith*.

The Board's decision in *R.J. Smith* was set aside and remanded by the Court of Appeals for the District of Columbia Circuit. *Engineers Local 150 v. N.L.R.B.*, 480 F.2d 1186 (1973). The court noted that the employer acted without notice to the union and held such unilateral conduct to be violative of Section 8(a)(5) of the Act even though the union did not represent a majority of the employees.

The court held that the election proviso to Section 8(f) provided machinery for an employer to test the union's majority. If the employer chose to seek an election, and if the results proved that the union had minority status, then

the employer would not be required to honor the 8(f) agreement. Until then, the court held that the 8(f) agreement was enforceable.[9]

Board Decision in *Higdon*.

The Board continued to adhere to its interpretation of Section 8(f) of the Act. This set the stage for the next confrontation with the District of Columbia Circuit which occurred in *Higdon. Local Union No. 103 (Higdon Contracting Co.)*, 216 NLRB 45 (1975).

Unlike *R.J. Smith* and *Ruttmann, Higdon* involved a charge against a union alleging a violation of Section 8(b)(7)(C) of the Act which prohibits recognitional picketing exceeding thirty days if an election petition has not been filed with the Board. The Board recognizes an exception to the literal terms of Section 8(b)(7)(C) and permits continuous recognitional picketing if such does not seek *initial* recognition. Thus a union can picket for an unlimited duration for a renewal of a prior agreement or to enforce a current agreement. The existence of a valid collective bargaining agreement therefore constitutes a defense to an 8(b)(7)(C) charge. At issue in *Higdon* was whether such a defense was valid where a minority union's picketing was conducted to enforce current compliance with a Section 8(f) agreement.

The employer in *Higdon* was actually two entities. Higdon Construction Company signed a prehire agreement with the union. Thereafter Higdon Contracting Company was formed for the sole purpose of performing nonunion work.

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[9]On remand the Board accepted the court's decision as the law of the case, noting that it chose not to seek a petition for certiorari to review the court's decision. The Board did serve notice that it intended to apply the law of its original decision in future cases. *R.J. Smith*, 208 NLRB 615.

Shortly after the second entity began working on a "nonunion" jobsite, the union discovered the arrangement and confronted the owner of both companies. The owner admitted that both companies were "one and the same" and that he formed the second company to perform nonunion work. The union then began picketing at the nonunion jobsite to enforce its prehire agreement.

The Administrative Law Judge before the Board found the two companies to be alter egos and the prehire agreement therefore to be applicable to both entities. The Judge then sought to distinguish the application of *R.J. Smith*. The Judge noted that the employer in *R.J. Smith* never implemented the prehire agreement. The employer in *Higdon* did implement the agreement and there was no evidence that it "actually repudiated" the agreement. Rather, the employer sought to adhere to the agreement on union projects but to avoid it on nonunion projects. The Judge held that this "blow hot, blow cold"[10] adherence to the agreement did not render the union's conduct "vulnerable" to Section 8(b)(7)(C). The Judge considered the lack of a total repudiation of the agreement to be significant:

> Since there is no persuasive evidence that the Employer, who had recognized the Union, intended to terminate the contract *in toto* but only sought by subterfuge and chicanery to avoid its application for nonunion work while adhering to the contract for union work, the picket legend published the truth.
> *Higdon*, 216 NLRB at 50.

The Judge concluded that the employer had recognized the union and, therefore, the picketing was not for initial recognition.

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[10] *Higdon*, 216 NLRB at 49.

On review, the Board accepted the Judge's finding that the two entities were alter egos. The Board then specifically noted the Judge's distinction of *R.J. Smith* on the ground that the contract was not "actively repudiated" but was indeed followed on "union" projects. The Board rejected the distinction.

The Board reviewed and reaffirmed its decisions in *R.J. Smith, Ruttmann* and *David F. Irvin, et al., d/ba The Irvin-McKelvy Company*, 194 NLRB 52 (1971). The Board emphasized, citing *Irvin-McKelvy*, that even if a union establishes its majority status on individual projects, no presumption of majority status flows to other projects. *Higdon*, 216 NLRB at 46.

The Board then reasoned that because the employer was free, under Section 8(a)(5), to "ignore" the agreement "with respect to nonunion jobs," the union's excessive picketing to enforce its "noneffective 8(f) contract" was for initial recognition and therefore proscribed by Section 8(b)(7)(C). *Higdon*, 216 NLRB at 46.

District of Columbia Circuit Revisited.

The union sought review of the Board's order in the Court of Appeals for the District of Columbia Circuit. Citing its earlier rejection of the Board's *R.J. Smith* decision the court refused to enforce the Board's order. The court chided the Board for its interpretation of Section 8(f) and held that it was the employer, not the union, that had violated the Act. Once again, the court adhered to its opinion that minority agreements are enforceable until the employer successfully utilizes the machinery set forth in the election proviso. *Local 103, Iron Workers v. N.L.R.B.*, 535 F.2d 87 (1976).

The Board's Petition to This Court.

The Board petitioned this Court for a writ of certiorari. The Board made it clear that it did not seek to limit the scope of this Court's review to an interpretation of Section

8(b)(7)(C) picketing. Rather, the Board sought a broad review of the Board's interpretation of Section 8(f). The Board, in its petition, reviewed its *R.J. Smith* and *Ruttmann* decisions and their application in *Higdon*. The Board specifically noted the District of Columbia Circuit's earlier rejection of the Board's position and sought the petition to resolve this continuing conflict.[11]

This Court granted the Board's petition.

Argument Presented to This Court.

The Board vigorously attacked the rationale of the District of Columbia Circuit that minority agreements are enforceable until the employer successfully utilizes the provisions of the election proviso to prove the union's lack of majority status. The Board adamantly opposed any notion that the employer had any obligation to trigger the unenforceability of minority agreements. The Board stressed the paramount right of employees to be free to choose their own representative requires that the *union* must establish and prove majority status:[12]

> The significant difference between the court's position and the Board's, relates to *when* the agreement becomes unenforceable and who has the burden of triggering the determining event. The Board's position, unlike the court's, is consistent with the basic principles of the Act, which impose an affirmative obligation on unions to achieve and demonstrate majority support.[13]

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[11]The Board reasoned that Section 10(f) of the Act permits any aggrieved party before the Board to seek review in the District of Columbia Circuit no matter where the conduct occurred. Therefore, if the Board was to continue to apply the interpretation of Section 8(f) it deemed proper, it was necessary to have this Court resolve the continuing conflict. Petition for Certiorari, pp. 9-10, 19-20, *Higdon*, 434 U.S. 335 (1978).

[12]Brief for Petitioner, pp. 12, 29-32, *Higdon*, 434 U.S. 335 (1978).

[13]Brief for Petitioner, p. 31, *Higdon*, 434 U.S. 335 (1978).

The union, in addition to arguing that Congress intended to permit enforcement of agreements if it intended to permit their existence, also argued that a contrary finding by this Court would be inconsistent with this Court's earlier decision in *Retail Clerks International Association v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962), which allegedly stood for the proposition that federal courts could entertain suits under Section 301 based on agreements authorized by Section 8(f).

The Board, in its reply brief, argued that the *Lion Dry Goods* decision dealt only with the *jurisdiction* of courts to entertain suits under Section 301 and did not address the validity or enforceability of particular agreements. The Board agreed that courts under Section 301, just as the Board under Section 8(a)(5), could enforce 8(f) agreements "if the union in fact represents a majority of the employees."[14] But, the Board argued:

> *Lion Dry Goods* does not suggest that Section 301(a) renders enforceable contracts the enforcement of which would otherwise contravene the policies of the National Labor Relations Act, which is the very issue presented in this case.[15]

The Board strenuously argued that federal courts may only enforce agreements under Section 301(a) "so long as they are otherwise consistent with the policies of the Act." The Board noted that this Court and other courts have made this clear by not enforcing contracts where enforcement would conflict with Board decisions under the Act.[16]

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[14]Reply Brief for Petitioner, p. 2, *Higdon*, 434 U.S. 335 (1978).
[15]Reply Brief for Petitioner, p. 3, *Higdon*, 434 U.S. 335 (1978).
[16]Reply Brief for Petitioner, p. 3, n. 2, *Higdon*, 434 U.S. 335 (1978).

B. This Court in *Higdon* Held That Minority Prehire Agreements Are Unenforceable.

In *Higdon* this Court briefly reviewed the Board's continued conflict with the District of Columbia Circuit and established the issue to be the validity of the Board's interpretation of Section 8(f) and its interplay with "other sections of the Act, primarily §§ 8(a)(5) and 8(b)(7)(C)." *Higdon*, 434 U.S. at 341.[17] After an extensive analysis of legislative history, this Court held that prehire agreements are unenforceable until the union obtains the majority support of the employees. Despite this ruling, courts have struggled with the question of the enforceability of minority prehire agreements in Section 301 litigation.

The courts which have adopted the position of this Court that minority prehire agreements are unenforceable have focused their inquiry on *employee* rights and have recognized that enforcement of minority prehire agreements is inconsistent with these rights.

The courts which have enforced the terms of minority prehire agreements have resisted a rule of law which they believe conflicts with the basic principle of common law that parties should be bound to their contractual agreements. This notion is based on a false premise and assumes the ultimate fact.

These courts view collective bargaining agreements as contracts between unions and employers. They are not. Collective bargaining agreements are contracts between an

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[17]The Eighth and Tenth Circuits held that this Court, in its *Higdon* decision, "did not purport to decide the enforceability of all Section 8(f) agreements but only those which implicated the provisions of Section 8(b)(7)(C)." *Contractors, etc. v. Associated Wrecking Co.*, 638 F.2d 1128 at 1133 (8th Cir. 1981); *New Mexico Dist. Council, etc. v. Mayhew Co.*, 664 F.2d 215 at 219 (10th Cir. 1982). This analysis is clearly in error.

employer and its employees, through the union as the *agent* — the collective bargaining agent — of the employees.[18]

This Court has held that a prehire agreement "attains the status of a collective-bargaining agreement" only when the union obtains majority support. *Higdon*, 434 U.S. at 350. Until then the union is an agent waiting for a principal. Until then the prehire agreement is a document waiting to be adopted by a majority of the employees.

C. This Court's Decision Was Based on an Analysis of Employee Rights and Legislative History.

The cornerstone of this Court's decision in *Higdon* was based on the wishes of the employees. This Court noted that the Board's position was rooted in the statutory policy that a union should not act as the collective bargaining agent for employees unless it is the voice of the majority of the employees. *Higdon*, 434 U.S. at 344. This Court then reiterated its prior holding in *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975), that one of the major aims of the 1959 Act was to limit "top-down" organizing. This Court emphasized that such Congressional concern "did not evaporate as the focus turned to the construction industry" and admonished that the convenience afforded the construction industry to enter into prehire agreements was not meant to "be portrayed as an expression of

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[18]The rights of employees under the Act to select their own bargaining agent has been rightfully characterized by the Board as a fundamental right. It is a violation of the law for employers and unions in most industries to enter into an agreement if the union does not represent a majority of the employees. This is true even if both entities have a good faith belief that the union represents a majority of the employees. Prehire agreements in most industries are thus violative of the law. *Higdon, supra; Garment Workers v. N.L.R.B.*, 366 U.S. 731 (1961).

Section 8(f) was passed so that employers and unions would not violate the Act by entering into prehire agreements. But the Board and this Court have held the application of the section to be limited by the *fundamental* right of employees to select their own representative.

the employees' organizational wishes." As this Court observed, the proviso to Section 8(f) was added to ensure that an election could be demanded despite the existence of the prehire agreement. *Higdon*, 434 U.S. at 347-49.

Despite this Court's concern for the will of the employees, the court below has held that minority prehire agreements are enforceable until notice of repudiation.

This Court rejected the similar requirement imposed by the Court of Appeals for the District of Columbia that an employer must successfully prove the union's minority status through the election process before the minority prehire agreement became unenforceable.

The Board, in opposing this requirement, noted that the court of appeals actually agreed that minority agreements were unenforceable, it only disagreed as to *when* they became unenforceable. The Board argued that the formula utilized by the District of Columbia Circuit was "contrary to the Act's *fundamental principle* that employees shall have the right to 'bargain collectively through representatives of their own choosing.' " Petition for Certiorari, pp. 18-19, *Higdon*, 434 U.S. 335 (1978).

The Board also argued that the court of appeals' position was contrary to this Court's admonition in *Connell Construction Co., supra*, 421 U.S. at 632 that the 1959 amendments to the Act were designed to limit "top-down" organizing practices. Furthermore, the Board argued that "the Act places the burden on the union to establish its majority" and the court of appeals' rule was inconsistent with this burden because it required the employer to trigger the unenforceability of minority agreements. Petition for Certiorari, p. 18, *Higdon*, 434 U.S. 335 (1978).

Finally, the Board noted that Congress, in enacting Section 8(f), rejected a proposal that would have permitted the

Board to certify a union signing a prehire agreement as the employees' bargaining representative without proof of majority support.[19] The Board argued that the rule of the District of Columbia Circuit would, in effect, afford the union the presumption of majority status that Congress specifically rejected. Petition for Certiorari, pp. 15 and 17, *Higdon*, 434 U.S. 335 (1978).

By reversing the court of appeals in *Higdon*, this Court effectively rejected the similar analysis of the court below. Once again, the court below has focused on the conduct of the employer by requiring an affirmative act to trigger the unenforceability of minority prehire agreements.

Again, the court of appeals does not disagree that minority prehire agreements are unenforceable, it only disagrees as to *when* they are unenforceable.

Again, this principle conflicts with the *fundamental right* of employees to select their own representative; is inconsistent with the statutory scheme requiring the union to establish its majority status; and, in effect, affords the union the presumption of majority status that Congress specifically rejected.

Again, this principle conflicts with this Court's admonition in *Connell, Higdon* and *Woelke & Romero Framing, Inc. v. N.L.R.B.*, 102 S.Ct. 2071 (May 24, 1982), that Congress in enacting the 1959 amendments to the Act intended to limit "top-down" organizing. Three times this Court has examined the "top-down" organizing effect of Section 8(f) and each time this Court has strictly curbed such effect by limiting the scope of prehire agreements.[20]

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[19]Brief for Petitioner, p. 24, *Higdon*, 434 U.S. 335 (1978).

[20]As the District Court for the Northern District of Illinois stated in *Carpenters Pension Fund v. Sorensen*, 108 LRRM 2988 at 2991 (1981):

> "If this court enforced this agreement, there would be no reason why a union would need to obtain majority support."

Legislative History.

The Board, this Court, and almost every court that has passed on this issue cite the same legislative history to support conflicting conclusions. As this Court noted in *Higdon*, there were two aspects peculiar to the construction industry which led Congress to sanction prehire agreements:

> One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. *Higdon*, 434 U.S. at 348, citing H.R. Rep. No. 741, I Leg. Hist. 777.

The court below and other courts which have enforced minority prehire agreements have noted these benefits and have concluded that it would be unjust to allow employers to gain these benefits and not comply with the agreements.[21]

However, the employers involved in these cases rarely, if ever, receive such benefits. The cases in which minority prehire agreements have been enforced are usually cases where employers have obtained their own work force and have paid wages different than those specified in the agreement. Their bids on the various jobs were related to wage rates actually given, not to those in the ignored prehire agreements. The case in issue as well as the cases of *Trust Fund v. McDowell*, 103 LRRM 2219 (W.D. Wash. 1979),

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[21]Once again, the Board has rejected this very proposition and has been upheld by this Court. The Administrative Law Judge in *R.J. Smith* had concluded that the employer had concealed its intentions to not honor the agreement and thus had sought to gain its benefits but not its burdens. Even if true, which is doubtful, the Board viewed the matter from the standpoint of employee fundamental rights. the Board reasoned that the election proviso constituted "a statutory safeguard against just the sort of irresponsibly imposed minority union which [the] record reveal[ed]". *R.J. Smith*, 191 NLRB at 694.

rvs'd, No. 80-3024 (9th Cir. Mar. 2, 1982), *petition for cert. filed* (U.S. May 28, 1982) (No. 81-2209); *Paddock v. Clark*, 107 LRRM 2325 (D. Ore. 1980), *rvs'd*, No. 80-3380 (9th Cir., Mar. 2, 1982), *petition for cert. filed* (U.S. Apr. 19, 1982); and *Welfare Fund v. Overhead Door Co.*, 681 F.2d 1 (D.C. Cir. 1982), are indicative. In the later three cases, the court below and the District of Columbia Circuit overruled district courts which had denied enforcement of minority prehire agreements. Although the court below and the District of Columbia Circuit have noted the benefits that prehire agreements can bring to employers as envisioned by Congress, they fail to mention that these employers received no such benefits.

When employers do obtain union referred workmen pursuant to prehire agreements, the union involved normally obtains majority status. This was envisioned by Congress in enacting Section 8(f)[22] and this Court acknowledged that such is the normal occurrence:

> "Neither has the Board challenged the voluntary observance of otherwise valid 8(f) contracts, which is the normal course of events." *Higdon*, 434 U.S. at 349.

When the union obtains its majority status through the employer's voluntary observance of the agreement, the Board will enforce the agreement in unfair labor practice proceedings. Thus, the interpretation of Section 8(f) adopted

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[22]The Report of the Senate Committee on Labor and Public Welfare stated:

> A second reason [for 8(f)] is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired. S.Rep. No. 187 on S. 1555, 86th Cong., 1st Sess. 28 (1959), 1 Leg. Hist. 424.

by this Court is more harmonious with legislative history than is the interpretation adopted by the court below.

Furthermore, the court below looks to only a part of the legislative history in reaching its decision. The Board in *R.J. Smith*, quoted and emphasized additional legislative history to support its conclusion that Congress intended to authorize prehire agreements only as preliminary steps and that the election proviso evidenced Congressional intent to inquire into the union's majority status *at any time*.

Finally, this Court rejected the argument of the court below:

> Privileging unions and employers to execute and observe prehire agreements in an effort to acccommodate the special circumstances in the construction industry may have greatly convenienced unions and employers, but in no sense can it be portrayed as an expression of the employees' organizational wishes. *Higdon*, 434 U.S. at 349.[23]

D. The Court Below Did Not Apply This Court's Rationale in *Higdon*.

Preliminary Step.

The decision of the court below assumes that the prehire agreement is something that it is not — something more than a preliminary step.

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[23]The U.S. District Court for the Northern District of Illinois, in the case of *Carpenters Pension Fund v. Sorensen*, 108 LRRM 2988 (1981), gave an excellent point by point critique of the faulty analysis used by courts which enforce minority prehire agreements. The court, at p. 2991, stated:

> Finally, the Eighth Circuit reasoned that a prehire agreement benefits employees as well as employers in that it allows construction bidders to know their labor costs in advance of their bids and ensures industrial peace. Since the employer benefits from the agreement, he should also honor his obligations under it. But the fact that a prehire agreement is a valuable tool is not in dispute. Merely because such agreements are advantageous is no reason to extend the effect of a prehire agreement beyond its original purpose. A prehire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship.

The Board has stated more than once that a prehire agreement is *only* a preliminary step which envisions further acts before it becomes a binding collective bargaining agreement.

Once again, this Court, citing the Board's *Ruttmann* decision, adopted this position:

> As viewed by the Board, a "prehire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship"
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> * * *
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> When the union successfully seeks majority support, the prehire agreement attains the status of a collective-bargaining agreement. . . . *Higdon*, 434 U.S. at 345, 350.

The court below was troubled with the concept that a minority prehire agreement may be void *ab initio*. It is not void *ab initio*. It is a real and viable preliminary step which may be voluntarily honored, and which, but for Section 8(f), would be violative of the law.

The court below, by requiring an employer to give notice of repudiation of a minority prehire agreement, is requiring an employer to repudiate a preliminary step. Furthermore, by enforcing the terms of the prehire agreement before such a notice of repudiation, the court below is enforcing something which has not yet "attained the status of a collective bargaining agreement." The court below is assuming the ultimate issue — whether or not the agreement is enforceable.

Conflict With Board.

Furthermore, this Court in *Higdon* specifically reviewed and adopted Board decisional authority which specifically rejected the analysis of the court below.

In *R.J. Smith*, the employer had totally ignored the prehire agreement from its execution. The employer concealed its intentions and noncompliance from the union. The union sought to recover *past* wages allegedly lost by the employees under the agreement. Such a claim would be honored by the court below since there was no active repudiation. The Board, however, held that the majority status of a union may be examined *at any time* in the litigation of refusal to bargain charges.

The Board held that a contrary result would be "anomalous" since the election proviso to Section 8(f) allowed such an inquiry at any time. This Court, in adopting this analysis, specifically noted the Board's decision in *R.J. Smith:*

> The proviso exposing unions with prehire agreements to inquiry into their majority standing by elections under §9(c) led the Board to its decision in *R.J. Smith:* an employer does not commit an unfair labor practice under §8(a)(5) when he refuses to honor the contract and bargain with the union and the union fails to establish in the unfair labor practice proceeding that it has ever had majority support. *Higdon*, 434 U.S. at 345.

The Board also refused to enforce a minority prehire agreement in *Ruttmann* even though the employer's noncompliance had again been concealed from the union.[24]

Finally, in *Higdon* itself, the Board specifically rejected the analysis of the court below. The Administrative Law Judge had distinguished *R.J. Smith* by noting that the employer did not actively repudiate the agreement but instead

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[24]The union business agent discovered the employer's noncompliance well after work had begun on the jobsite in dispute and asked why it had not been informed of the employer's presence on the project. *Ruttmann*, 191 NLRB at 706.

tried to abide by the agreement and ignore it at the same time.

In review, the Board specifically commented on and rejected the Judge's requirement of an active repudiation.

Unilateral Change.

The decision of the court below, requiring a notice of repudiation, is also inconsistent with the Board's holdings that employers may engage in unilateral changes of minority prehire agreements without violating Section 8(a)(5). The concept of "unilateral" change *assumes* that no notice was given to the union.

In *R.J. Smith*, the Administrative Law Judge,[25] the Board[26] and the court of appeals[27] all found that the employer's conduct was done without notice to the union. Nevertheless, the Board found the unilateral conduct to be privileged. In *Ruttmann* the Board again found that the employer's unilateral action was not violative of Section 8(a)(5). In *Higdon* the Board stated that where a union does not obtain majority status after obtaining a prehire agreement the employer does not violate Section 8(a)(5) "by *unilaterally* changing terms and conditions of employment set forth in the contract." *Higdon*, 216 NLRB at 46. (Emphasis added.)

This rule has been consistently followed by the Board. In *Dee Cee Floor Covering*,[28] 232 NLRB 421 at 422 (1977), the Board clarified the rule even further:

> Thus, where a union fails to prove that it has obtained majority status among the employer's employees, an

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[25] *R.J. Smith*, 191 NLRB at 697.

[26] *R.J. Smith*, 191 NLRB at 693.

[27] *Engineers Local 150 v. N.L.R.B.*, 480 F.2d 1186 at 1188 (1973).

[28] This case was presented to this Court in *Higdon*. It was specifically commented on by the Board in its Reply Brief at p. 8, n. 8.

> employer may withdraw recognition from that union *and/or make unilateral changes in the contractual working conditions* without thereby violating Section 8(a)(5) of the Act. (Emphasis added.)

The court below recognizes only half of this rule.

Jobsite-By-Jobsite.

This Court and the Board have repeatedly endorsed the concept that construction employers may ignore prehire agreements on "nonunion" jobs and honor them on "union" projects. These "union" and "nonunion" jobsites can, and do, exist at the same time. The "all or nothing" approach adopted by the court below does not allow for this jobsite-by-jobsite approach.

The rule of the court below was actually first advocated by the Administrative Law Judge in *Higdon* who condemned the employer's "blow hot, blow cold" utilization of the prehire agreement for union jobsites only, and considered it material that the employer had not terminated the contract "*in toto*". *Higdon*, 216 NLRB at 49-50.

The Board rejected the *in toto* repudiation argument and stated that the employer was privileged to honor the agreement on union jobsites but to ignore it on nonunion jobsites. The Board cited its earlier decision in *Irvin-McKelvy, supra*, and held that even if a union establishes its majority standing on individual projects, no presumption of majority standing flows to other projects. *Higdon*, 216 NLRB at 46.

This Court, in adopting the Board's position in *Higdon* specifically noted the *Irvin-McKelvy* case and adopted the proposition that the union must prove its majority status at each jobsite:

> The employer's duty to bargain and honor the contract is contingent on the union attaining majority support

at the various construction sites. *Higdon*, 434 U.S. at 345.

Recently, this Court in *Woelke & Romero, supra*, reaffirmed this position citing the Board's decision in *Giordano Construction Co.*, 256 NLRB No. 10 (1981):

> And the subcontractors themselves, if they do not have a stable workforce among whom the union has secured a majority, may be free to repudiate the [Section 8(f)] agreement at any project on which the union has not demonstrated that it represents a majority of their employees. *Woelke & Romero*, 102 S.Ct. at 2082.

The court below specifically rejected the jobsite-by-jobsite analysis adopted by this Court. In *Paddock v. Clark, supra*, the District Court for the District of Oregon dismissed a Section 301 suit against an employer who ignored the prehire agreement in performing a nonunion job after the union obtained majority status on one, and only one, prior jobsite. The district court specifically relied on this Court's *Higdon* decision and the Board case of *Dee Cee Floor Covering, Inc., supra*, which restated Board law that the union must establish its majority status on each project. The court below reversed the district court citing the decision now before this Court. The employer in *Paddock* was entitled to rely on Board law which had been endorsed by this Court. Only a reversal of the decision below will vindicate its reliance.

Voidable.

The court below, to support its position, reviewed this Court's *Higdon* decision and noted that this Court, in one instance, labeled prehire agreements "voidable." The court below then reasoned that the employer must actively repudiate such an agreement and further held that noncompliance with the agreement does not constitute sufficient notice of repudiation.

Initially, it is important to note that this Court was actually paraphrasing the position of the Board when it used the term "voidable."[29] The Board itself had used the term in its *Higdon* decision.[30] Yet in the very sentence that the Board used the term "voidable" it ruled that an employer may "ignore" a minority prehire agreement on "nonunion jobs" yet be free from the strictures of "an 8(a)(5) bargaining order." Thus, the Board not only rejected the requirement of a notice of repudiation in its *Higdon* decision, it did so in the very sentence that it used the word "voidable."

The isolation and distortion of the term "voidable" ignores the numerous statements by this Court that the enforceability of a prehire agreement is *contingent* on the union obtaining majority support among the employer's employees.

This Court embraced Board law which held that the duty "to honor the contract is contingent on the union attaining majority support" and that an employer does not violate Section 8(a)(5) when it "refuses to honor the contract" and the "union fails to establish in the unfair labor practice proceeding that it has ever had majority support." *Higdon*, 434 U.S. at 345. This Court also noted that the Board will not issue a Section 8(a)(5) bargaining order against an employer refusing to honor a prehire agreement "unless the union can demonstrate its majority status." *Id.* at 344. Finally, this Court noted that the Board emphasized that the union in *Higdon* had not achieved majority support and the prehire agreement therefore "had no binding force." *Id.* at 340.

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[29]"Under the Board's view . . . the prehire agreement is voidable . . . ." *Higdon*, 434 U.S. at 341.

[30]*Higdon*, 216 NLRB at 46.

Employee Detriment.

The courts which have enforced minority prehire agreements have mistakenly assumed that they were benefiting the employees. The fallacy of this argument was exposed by the U.S. District Court for the Northern District of Illinois in the case of *Carpenters Pension Fund v. Sorensen*, 108 LRRM 2988 at 2990 (1981):

> "This argument must be rejected for at least two reasons. First, it is not clear that payment of the pension is to the benefit of the employees. As an economic matter, these payments might erode wages which otherwise might be paid directly to defendant's employees. Second, and more importantly, it is not for the court to decide what the employees desire or what is for their benefit. Rather, it is for the employees to decide. If the majority of employees desire the union to take this action on their behalf, the union must show that it has majority support."

An obvious example of union action detrimental to employees in the enforcement of a minority agreement is found in *Local No. 1184 v. Moser Landscape, Inc.*, No. 81-3581 (C.D. Cal. Mar. 15, 1982), *appeal docketed*, No. 82-5388 (9th Cir. April 13, 1982). The union sued the employer to compel arbitration over the employer's refusal to use the union hiring hall on a project. An election was then held by the Board and the employees involved voted overwhelmingly against the union. Understandably so — the requirement for using the union hiring hall was obviously not in their best interests. Nevertheless, the district court, following *Todd v. McNeff*, felt compelled to enforce the prehire agreement until the date the union received notice of repudiation.

Furthermore, union trust funds are now loaning money to developers on construction projects who agree to perform

the project using only union signatory employers. Certainly a "nonunion" employee working for a "nonunion" employer could find it against his interests to have money paid "on his behalf" to such a trust fund. The use of the trust fund monies to exclude his employer from job opportunities is not to his benefit.[31]

In addition, union trust funds as well as unions benefit by top-down organizing. The use of union trust funds to support union construction is indicative. The point missed by the court below is that any enforcement of minority prehire agreements encourages unions to engage in, and to rely upon, top-down organizing.

In the final analysis, courts should not enforce or deny enforcement of prehire agreements on the basis of what they consider to be in the best interests of employees. The employees have this opportunity and no court should second-guess their judgment.

***Higdon* and Section 301.**

This Court, in *Higdon*, specifically dealt with the applicability of its holding to Section 301 suits. In rejecting the union's position that its holding was inconsistent with *Retail Clerks International Association v. Lion Dry Goods, Inc.*, 369 U.S. 17, this Court explained that its earlier ruling concerned the jurisdiction of federal courts to entertain suits on Section 8(f) contracts. This Court then stated:

> That a court has jurisdiction to consider a suit on a particular contract does not suggest that the contract is enforceable. It would not be inconsistent . . . for the court to hold that the union's majority standing is subject to litigation in a §301 suit to enforce a §8(f) con-

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[31]See, *AFL-CIO BCTD Pension Strategy*, 109 Lab. Rel. Rep. (BNA) 192 (Mar. 1, 1982); *Pension Fund Investment In Construction Industry*, 109 Lab. Rel. Rep. (BNA) 150 (Feb. 22, 1982).

> tract, *just as it is in a §8(a)(5) unfair labor practice proceeding*, and that absent a showing that the union is the majority's chosen instrument, the contract is unenforceable. *Higdon*, 434 U.S. at 351-52. (Emphasis added).

This statement was not mere *dicta*. This Court addressed an issue specifically briefed and argued by the parties. Not only is majority status litigable in Section 301 suits, it is litigable "just as it is in a §8(a)(5) unfair labor practice proceeding". The adoption of the "notice of repudiation" rule by the court below is in direct conflict with this Court's holding.

E. The Decision Below Renders the Election Process of the Act Meaningless.

This Court, in *Higdon*, noted that the proviso to Section 8(f) provides that prehire agreements shall not bar a petition for an election under the Act. This Court emphasized that the "employer and its employees — and the union for that matter — may call for a bargaining representative election at any time." *Higdon*, 434 U.S. at 345. This Court reasoned that this proviso evidenced the intent of Congress that prehire agreements were not meant to be imposed on employees despite their wishes. *Id.* at 349.

A call for an election is totally irrelevant in the Eighth and Tenth Circuits since these courts have held that minority agreements are enforceable in any event. *Contractors, etc. v. Associated Wrecking Co.*, 638 F.2d 1128 (8th Cir. 1981); *New Mexico Dist. Council, etc. v. Mayhew Co.*, 664 F.2d 215 (10th Cir. 1982). An election petition filed by an employer in the Ninth Circuit would only be relevant as evidence of repudiation. But the same would not be true of a petition filed by employees since it is the employer's repudiation which is crucial to the court below. And, in the

Ninth Circuit, an election would not be relevant for any point prior to repudiation even when the affected employees were eligible to vote in the election.[32]

These results stem from the fact that these courts of appeals do not focus their inquiry on the will of the employees. As such, the election process, which was an integral part of the Congressional scheme in enacting Section 8(f), does not fit into the analytic scheme fashioned by these courts of appeals.

These results also conflict with the decisions of this Court in *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964) and *South Prairie Construction Co. v. Local 627, Int'l. Union of Operating Engineers (Peter Kiewit)*, 425 U.S. 800 (1976).

In *Carey*, arbitration was sought pursuant to an enforceable collective bargaining agreement with a particular union. The nature of the grievance involved possible conflicts with employees represented by another union and the employer refused to arbitrate, contending that the Board had exclusive jurisdiction over such disputes. This Court noted that if the controversy were essentially a representational matter, the

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[32]Just such a result has occurred. The Board has often included past employees as well as present employees in elections in the construction industry. The Board often uses this special voter eligibility formula in the construction industry due to the fluctuation of the work force in the industry. *Daniel Construction Co.*, 133 NLRB 264 (1961).

The U.S. District Court for the Central District of California in the case of *Local No. 1184 v. Moser Landscape, Inc.*, No. 81-3581 (C.D. Cal. Mar. 15, 1982), *appeal docketed*, No. 82-5388 (9th Cir. Apr. 13, 1982), enforced the terms of a minority prehire agreement on a particular jobsite based on the Ninth Circuit's decision in this case. The employer sought an election after receiving the union's complaint. The Board conducted the election, using the *Daniel Construction Co.* formula, and included as eligible voters employees working on the past project. The union lost the election 25 to 1. The election results were irrelevant to the court which looked only to the date on which the union received a notice of repudiation.

employer could protect itself by invoking the procedures of the Board. *Carey*, 375 U.S. at 268. Since the employer had not yet invoked the procedures of the Board, this Court refused to halt arbitration based upon speculation that a final result might conflict with Board law. This Court did, however, state that if the Board reviewed and disagreed with the arbitrator's award, then, "the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with that ruling, it would not be liable for damages under §301." *Id.* at 272. This Court also noted that the "*superior* authority of the Board may be invoked at any time." (Emphasis added) *Id.* at 272.

In South Prairie Construction Co. v. Local 627, Int'l. Union of Operating Engineers (Peter Kiewit), supra, this Court vacated the judgment of a court of appeals which, upon review of a Board order, had determined, in the first instance, a representation issue. The Board had not addressed the issue because it disposed of the case on other grounds. This Court held that the representation issue should have been determined initially by the Board. This Court noted that the Board's decisions on such matters, if not final, are, nevertheless, "rarely to be disturbed."

It is clear that the court below did not defer to the Board in its initial determination of the representation issue. The court below went even further, it rendered the Board's representation proceedings meaningless. McNeff, Inc. had invoked the "superior authority" of the Board by filing a petition for an election.[33] The final result of the Board's exercise of such authority is now meaningless because the majority status of the union is not relevant to the court below.

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[33]The court below should have deferred to the superior authority of the Board at the time the Board's authority was invoked.

Board Procedures.

In reaching its decision, the court below presented a misconception of the Board's election and unfair labor practice proceedings:

> The Board has expertise in determining the majority status of a union at any given time. It has no apparatus for determining a union's past status.

It is true that the Board's certification of election results reads for the present and the future. However, in the construction industry, past employees are often included with present employees as eligible voters in the election.[34] Furthermore, the Board often conducts representational hearings to determine if an election should be held. At issue in many of these hearings is whether the union had obtained a majority *in the past* among a stable complement of employees. If so, then the prehire agreement had attained the status of a collective bargaining agreement and would be a bar to an election under the Board's contract bar rules. These very facts and issues were litigated in the Board's representational case in *Giordano Construction Co.*, 256 NLRB No. 10, which was adopted by this Court in *Woelke & Romero, supra* at 4543.[35]

Furthermore, the court's position that the Board has no apparatus to determine a union's past majority status shows no understanding of Board unfair labor practice proceed-

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[34]There are situations where an election result will not reflect the majority status of a union at a certain time. This Court recognized in *Higdon* that representation elections "are not feasible" in a large segment of the construction industry. *Higdon*, 434 U.S. at 349. But this does not mean that election results should be ignored where they do reveal the majority status of the union at the time in question. It also does not mean that employee sentiment should be irrelevant. This is totally contrary to the cornerstone of this Court's decision.

[35]Pursuant to Section 101.20 of the Board's Rules and Regulations, Series 8, as amended, all parties have the right to present evidence in representational hearings.

ings. Because of the very nature of Section 8(a)(5) proceedings, the Board looks to *past* conduct by the employer and determines whether the union had majority status prior to or at the time of such past conduct. Congress gave the Board more than sufficient subpoena powers to conduct these inquiries.[36]

F. Only Voluntary Prehire Agreements Are Authorized by *Higdon*.

In its *Higdon* decision this Court repeatedly emphasized that Congress intended prehire agreements to be voluntary and that "no element of coercion" was permitted in obtaining such agreements. In reviewing legislative history, this Court noted Senator Kennedy's explanation to the Senate that the legislation was not intended to authorize coercion to obtain prehire agreements where the majority status of the union had not been established. *Higdon*, 434 U.S. at 348, n. 10, citing II *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 1715.

Despite this, the court below sanctioned the acquisition of minority prehire agreements by coercion by holding that such issues can only be raised at the time of repudiation.[37] No other court of appeals has adopted this ruling.

Thus, minority unions can obtain recognitional rights by coercion and, until repudiation, can effectively impose their will on the majority of the employees. This coercive rep-

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[36]29 U.S.C. Sec. 161.

[37]Although picketing was not involved in this case, the decision has been applied to enforce a minority prehire agreement obtained by picketing. *Local No. 1184 v. Moser Landscape, Inc.*, No. 81-3581 (C.D. Cal. Mar. 15, 1982), *appeal docketed*, No. 82-5388 (9th Cir. Apr. 13, 1982).

resentation can continue forever if the employer refuses to repudiate the agreement.

The Board has not specifically held that picketing to obtain a prehire agreement is itself unlawful. However, the Board has long recognized that prehire agreements should only be obtained by voluntary means. In *R.S. Noonan*, 142 NLRB 1132 (1963), the Board stated that the legislative history to Section 8(f) "unequivocally" shows that "a union cannot picket" for a prehire agreement. The Board found that the union violated Section 8(b)(7)(C) by picketing for over thirty days for a prehire agreement without the required representation petition having been filed. The Board ruled that this was true even though the employer had no employees which could vote in such a representation election.

Furthermore, even the dissent in the Board's *R.J. Smith* decision noted that legislative history requires that prehire agreements "must be entered into voluntarily by both parties." *R.J. Smith*, 191 NLRB at 696.

Whether or not the use of involuntary means to obtain a prehire agreement is itself a violation of the law is not controlling. Congress, this Court and the Board have stated that prehire agreements *must* be entered into voluntarily. If an affirmative defense cannot be raised on this issue, unions can ignore the will of Congress and the decisions of this Court and reap the benefits from their misconduct.

It is not logical that this defense cannot be raised until the employer notifies the union that it is repudiating the agreement. This allows the union to achieve compliance with the agreement through methods condemned by Congress and this Court.

This Court recently held in *Kaiser Steel Corporation v. Julius Mullins*, 70 L.Ed.2d 833, 102 S.Ct. 851 (January 13, 1982), that an employer may raise the illegality of a

contract as a defense to a breach of contract suit brought by trustees pursuant to Section 301 of the Act. This Court did not limit such a defense to a point in time at which the employer repudiated the agreement or any other artificial time.

Finally, it is important to note that the court below, the District of Columbia Circuit and the Eighth Circuit actually encourage the use of coercion to obtain prehire agreements. These courts note that prehire agreements benefit employers by providing them with labor peace. The obvious corollary is that if they had not entered into the prehire agreements, unions could legitimately use economic pressure to obtain the agreements despite the will of Congress.

THE DECISION BELOW FRAGMENTS NATIONAL LABOR POLICY BY ESTABLISHING CONFLICTING DUAL POLICIES ADMINISTERED BY TWO DIFFERENT TRIBUNALS.

The national labor policy enforced uniformly throughout the nation by the Board is that prehire agreements are not enforceable absent a showing of union majority status. The Board has made it clear that proof of majority status is a condition precedent to enforceability under Section 8(a)(5) of the Act. No affirmative repudiation by the employer is required to perfect the employer's defense.

This national labor policy is being eroded by the decision of the court below and by those of the Eighth, Tenth and District of Columbia Circuits. These courts have developed their own national labor policies by holding minority-union prehire agreements to be enforceable in Section 301 litigation. The Eighth and Tenth Circuits have held them to be enforceable at all times. The court below and the District of Columbia Circuit have held them enforceable until repudiation. The difference in these opinions is one of degree

only. They all conflict with the national labor policy embraced by this Court.

Unions and trust funds may now shop forums to obtain the more favorable national labor policy.[38] This case not only involved shopping between two forums, it involved the utilization of both forums. One forum, the Board, rejected the claim based on its interpretation of national labor policy. The other forum then upheld the same claim based on its own national labor policy. Such a result is totally adverse to this Court's repeated insistence upon a uniform national labor policy.

In *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), this Court admonished that federal common law regarding enforcement of collective bargaining agreements under Section 301 must be fashioned "from the policy of our national labor laws." *Id.* at 456. Furthermore, this Court has held that the subject matter of Section 301 is "peculiarly one that calls for uniform law." *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 at 103 (1962). In *Howard Johnson Co. v. Detroit Joint Board*, 417 U.S. 249 (1974), this Court specifically rejected the proposition that basic federal labor policy formulated in unfair labor practice cases can be ignored in Section 301 litigation.

In *Howard Johnson* the union sought to compel a successor employer to arbitrate pursuant to a collective bargaining agreement with as predecessor employer. This Court

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[38]The substantive remedies for breach of contract under Section 301 are no greater than those remedies available through the Board under Section 8(a)(5). If an employer refuses to honor an enforceable collective bargaining agreement, the Board, under Section 8(a)(5), can order the employer to honor the agreement and make back-payments for lost fringe benefits as well as lost wages. In *Smith v. Evening News Ass'n.*, 371 U.S. 195 (1962) this Court held that the Board and the courts have concurrent jurisdiction to solve disputes when an unfair labor practice also constitutes a breach of contract.

had earlier held in an unfair labor practice context that a successor employer was not obligated to adhere to the terms of the predecessor's collective bargaining agreement. This Court rejected the union's claim that a contrary result should be permitted under Section 301 of the Act:

> It would be plainly inconsistent with this view to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in a suit under §301, and thus to permit the rights enjoyed by the new employer in a successorship context to depend upon the forum in which the Union presses its claims. *Howard Johnson*, 417 U.S. at 256.

This Court emphasized that the union's "effort to circumvent [this Court's prior decision] by asserting its claims in a § 301 suit to compel arbitration rather than in an unfair labor practice context cannot be permitted." *Id.* at 262.

National labor policy can now be ignored in four circuits, and, as this Court has stated, this cannot be permitted.

The Eighth Circuit in *Contractors, etc. v. Associated Wrecking Co.*, 638 F.2d 1128 (1981) held that different principles apply in Section 301 as opposed to unfair labor practice litigation:

> To say that an employer may challenge the majority status of a union in an unfair labor practice proceeding is not to say that the employer may assert the union's lack of majority status as a defense in a breach of contract action on a type of contract specifically authorized by the Act. *Associated Wrecking*, 638 F.2d at 1133.

The Tenth Circuit, in *New Mexico Dist. Council, etc. v. Mayhew Co.*, 664 F.2d 215, at 219 (1981), specifically adopted the Eighth Circuit's view on this issue. In adopting these conflicting standards for Section 301 and unfair labor

practice cases, neither court dealt with or distinguished this Court's decision in *Howard Johnson*.

The court below was not as blatant as the Eighth and Tenth Circuits in adopting separate labor policies for Section 301 litigation. The court below stated that it did not limit the *Higdon* decision solely to unfair labor practice charges. The court, nevertheless, adopted its own labor policy.

It noted that only "some language" in the Board decisions supported the proposition that unions must affirmatively demonstrate majority status before an enforceable collective bargaining agreement is formed. It alluded to the possibility that the Board's decision in *Higdon* was "written even more broadly" than was this Court's decision. Furthermore, in rejecting the concept that noncompliance could constitute repudiation, the court hypothesized that open and notorious noncompliance "can be so bald" as to constitute notice of repudiation, and cited the Board's decision in *Higdon* in support of this proposition.

The Board's decision in *Higdon* had absolutely nothing to do with "bald" compliance putting "the union on notice of the employer's intent to repudiate." The Board, in fact, took the opportunity to specifically reject any requirement of a notice of repudiation, actual or constructive. The court's half-hearted attempt to accommodate its policy with Board law is nonpersuasive.[39] It unilaterally and clearly formed its

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[39]Before rendering its decision herein, the Ninth Circuit reviewed a Board case involving a Section 8(f) agreement in *Precision Striping v. NLRB*, 642 F.2d 1144 (1981). The court noted that the case involved an unfair labor practice proceeding and that it "need not decide whether the union may be entitled to enforcement of the contract under Section 301(a) . . ."

The District of Columbia Circuit in *Overhead Door*, *supra*, also made an attempt to reconcile its decision with Board policy by noting one case in which the Board held that picketing to force past payment of benefits under a minority prehire agreement on one employee, did not

own national labor policy, which it dubbed the "middle ground."

It is respectfully submitted that this Court should adopt the decision of the Court of Appeals for the Fifth Circuit in *Baton Rouge Bldg. & Const. v. E.C. Schafer Construction*, 657 F.2d 806 (1981). This circuit correctly analyzed the issue as one of employee free choice. In rejecting the application of different policies for Section 301 litigation and unfair labor practice litigation, the court stated:

> But this distinction makes no difference. If the goal is the maintenance and insurance of *employee* free choice, it matters not whether the sword dangling above the employer's head is an unfair labor practice charge or a breach of contract suit. The direction of the pressures is the same — toward treatment of a nonmajority union as the employee's agent for collective bargaining. *E.C. Schafer*, 657 F.2d at 813.

UNION TRUST FUNDS CANNOT ENFORCE MINORITY PRE-HIRE AGREEMENTS PURSUANT TO THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980.

In 1980, Congress enacted the Multiemployer Pension Plan Amendments Act of 1980.[40] Section 306 of the Act provides:

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constitute recognitional picketing within the meaning of Section 8(b)(7)(C) when the union did not seek current recognition. The Board ruled that the prohibitions of 8(b)(7)(C) apply only to picketing for current recognition. *International Union of Operating Engineers, Local 150*, 255 NLRB No. 83 (1981). But the Board did not say that the union could have enforced its claim in an 8(a)(5) proceeding and it did not base its decision on a notice of repudiation rationale. It is difficult to believe that the Board overruled twelve years of consistent Board law in Section 8(a)(5) cases in this 8(b)(7)(C) case. A simple examination of the facts in *Overhead Door* refutes the District of Columbia Circuit's rationale. *Overhead Door* is the mirror image of *R.J. Smith*. The Board would not enforce either agreement. The District of Columbia Circuit enforced both using substantially the same rationale.

[40]Pub.L. No. 96-364, 94 Stat. 1208.

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or agreement. 29 U.S.C. § 1145.

The Court of Appeals for the District of Columbia Circuit alluded to this section in *Welfare Fund v. Overhead Door Co.*, 681 F.2d 1 (1982) and suggested that it may stand for the proposition that employers may be prohibited from alleging the unenforceability of prehire agreements in actions brought by union trust funds. The court noted statements by Congressman Thompson and Senator Williams expressing disapproval of the district court's original decision in *Overhead Door*, 488 F.Supp. 816 (1980). However, the court refused to rely on such a legislative interpretation, noting that the 1980 act "did not refer specifically to prehire agreements at all."

This Court rejected a similar interpretation of the 1980 amendments in *Kaiser Steel Corporation v. Julius Mullins*, 102 S.Ct. 851, 70 L.Ed.2d 833 (1982).

In *Mullins*, this Court held that the illegality of an agreement under Section 8(e) of the Act may be raised as an affirmative defense in Section 301 litigation. This Court noted that Congressional history of the section in issue reflected an intent to negate *unrelated* defenses and held that the illegality of an agreement was not an "unrelated" or "extraneous" defense. This Court did not attribute the views of the two Congressmen to Congress as a whole and further stated that the trust fund's argument necessarily assumed that Congress, in enacting the 1980 amendments, "implicitly repealed the antitrust laws, the labor laws, and any other statute which might be raised as a defense to a

provision in a collective bargaining agreement requiring an employer to contribute to a pension fund." This Court noted that such repeals by implication are disfavored and intent to repeal must be clear.

Similarly, Congress did not repeal Section 8(f), or any other section of "the labor laws" which supported this Court's decision in *Higdon*. Such intent to repeal must be clear.

Furthermore, the section by its own terms applies only to an employer who is "obligated to make contributions." The very issue in the enforceability of prehire agreements is whether the union has obtained majority status so that the agreement attains the status of a collective bargaining agreement. Until then, there is no "obligation". Furthermore, the status of the underlying agreement as an enforceable collective bargaining agreement is hardly an "unrelated" or "extraneous" defense.

Finally, the statute by its terms applies to a "collectively bargained" agreement. This concept assumes the adoption of the union as the agent of a majority of the employer's employees. This statute is consistent with the "fundamental principles" of the Act which protect employees in the selection of their bargaining agent. Once they adopt the agent, and "collectively bargain" for trust fund benefits, they are and consistently have been, protected by the federal labor laws.

CONCLUSION.

The court below did not make specific findings as to whether the Union had achieved majority status or whether the prehire agreement was voluntarily executed.

The case should be remanded to the court below to rule on these matters. The terms of the agreement should not be enforced if the Union did not enjoy majority status at the

relevant times. The terms of the agreement should not be enforced if it was not executed voluntarily.

Los Angeles, California.

Dated: August 30, 1982.

Respectfully submitted,

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No. 81-2150

IN THE

Supreme Court of the United States

October Term, 1982

JIM MCNEFF, INC., a California Corporation,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS.

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Questions Presented.

1. Whether a § 8(f) agreement is judicially enforceable for the term of the agreement accruing before the majority status of the union has been established under § 9 of the Act?

2. Whether alleged union coercion in obtaining a § 8(f) agreement is conduct arguably prohibited or protected under § 8 of the Act and, therefore, subject to the primary jurisdiction of the NLRB?

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No. 81-2150

IN THE

Supreme Court of the United States

October Term, 1982

JIM MCNEFF, INC., a California Corporation,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS.

Respondents Frank L. Todd, *et al.*, ("Trustees") pray the decision issued on February 8, 1982, by the U. S. Court of Appeals for the Ninth Circuit be affirmed. The decision of the Court of Appeals is officially reported at 667 F.2d 880. This Court granted the petition for a writ of *certiorari* on July 2, 1982, as reported at .... U.S. ...., 102 S.Ct. 3508.

STATUTES INVOLVED.

The statutes involved in this case are:

A. § 8(f) of the National Labor Relations Act, 73 Stat. 545, 29 U.S.C.A. § 158(f);

B. § 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C.A. § 185(a);

C. § 302(c)(5) of the Labor Management Relations Act of 1947, 61 Stat. 157-158, 29 U.S.C.A. § 186(c)(5); and

D. § 515 of the Employee Retirement Income Security Act of 1974, as added by § 306(a) of the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1295, 29 U.S.C.A. § 1145.

The text of each statute is set forth in the Appendix, *infra*.

STATEMENT OF THE CASE.

Jim McNeff, Inc. ("McNeff") signed a collective bargaining agreement ("Agreement") with the International Union of Operating Engineers, Local Union No. 12 ("Local 12") on September 13, 1978, after being told by a superintendent of the general contractor on a construction project, in the presence of a representative of Local 12, that McNeff would be required to sign the Agreement in order to continue performing work as a subcontractor on the project. (J.A. 40.)[1] After signing the Agreement, the President of McNeff informed all three employees that the Agreement would require the employees to join Local 12 as a condition of continued employment. All three employees signed documents necessary to join Local 12 and were dispatched by Local 12 as employees covered by the Agreement. (J.A. 40.)

The Agreement (J.A. 9-11) incorporated by reference the terms of the Master Labor Agreement negotiated between Local 12 and the Southern California General Contractors Associations for July 1, 1977, to June 15, 1980. The Master Labor Agreement contains a union security clause requiring employees covered by the agreement to become members of Local 12 within eight days of the start of their employment

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[1] "J.A." references are to the Joint Appendix, followed by page number of relevant material. "Ex.R." references are to the Excerpt of Record filed in the Court of Appeals, followed by page number.

"R.T." references are to the Reporter's Transcript of proceedings in the district court, followed by page and line of relevant discussion.

or the effective date of the agreement, whichever is later. (J.A. 38.) The Master Labor Agreement also contains a union signatory subcontracting clause prohibiting the subcontracting of work to be performed at the construction site, except to a subcontractor signatory to a labor agreement with Local 12. (J.A. 39.)

The Agreement obligated McNeff to report all hours of employment and pay contributions at specified hourly rates to the Operating Engineers Health & Welfare Fund, Operating Engineers Pension Trust, Operating Engineers Vacation-Holiday Savings Trust and Operating Engineers Training Trust (the "Trusts") on behalf of each employee covered by the Agreement. (Ex.R. 155.) From the signing of the Agreement until March, 1979, McNeff, Inc. filed monthly report forms furnished by the Trusts, but falsely reported that "no members of this craft were employed during the month." (Ex.R. 49-54.)

On November 30, 1978, the Trusts sent a letter requesting access to the payroll records of McNeff for the purpose of performing an audit. (Ex.R. 153.) When McNeff postponed and eventually refused to permit the audit (J.A. 36), the Trustees filed a complaint in this action on April 26, 1979. (J.A. 3.) The Trustees obtained access to the required payroll records through pretrial discovery proceedings in this action. (J.A. 28.) When performed on June 1, 1979, the payroll audit covered the interval from the signing of the Agreement on September 13, 1978, through April 30, 1979. (J.A. 30.) The amount of fringe benefit contributions, liquidated damages for late payment, and audit expense found to be due under the Agreement for that interval was $5,316.79. (J.A. 31.)

A motion for summary judgment was filed on behalf of the Trusts seeking recovery of the amount shown to be due by the audit. McNeff sought to avoid the summary judgment

by arguing that the Agreement was unenforceable for two reasons: (1) the Trusts had not proved that Local 12 had achieved a majority status among covered employees; and (2) the Agreement was signed by McNeff under coercion by Local 12. To support its arguments, McNeff showed the district court that the General Counsel of the National Labor Relations Board ("NLRB" or "Board") had declined to issue a complaint against McNeff based on a refusal to bargain charge filed by Local 12 under Section 8(a)(5) of the National Labor Relations Act ("Act"). (R.T. 4-5.) In addition, the record shows that McNeff had filed a petition for a union representation election with the NLRB, but that the election results had not been certified at the time of hearing on summary judgment. (R.T. 18.)

On February 11, 1980, the district court entered summary judgment for the Trusts in the full amount shown to be due by the payroll audit covering the interval from September 13, 1978, through April 30, 1979, plus attorneys' fees. (Ex.R. 222-223; Pet.App., pp. 10-11.) McNeff filed a timely notice of appeal. While the appeal was pending, the NLRB issued on November 17, 1980, a certification of results of election pursuant to McNeff's petition establishing that Local 12 did not receive a majority of votes cast in the election. (Pet.App., pp. 34-35.)

On McNeff's appeal, the Court of Appeals held that the Agreement signed by McNeff and Local 12 pursuant to § 8(f) of the Act is judicially enforceable as a contract obligation until an effective repudiation of the Agreement. (Pet.App., p. 7.) The Court of Appeals further held that the conduct of McNeff "enjoying the benefits of a pre-hire agreement and misleading the union as to the employer's intention of never performing its obligations" did not constitute an effective repudiation. (Pet.App., p. 8.) The Court of Appeals observed that the majority status of Local 12

would become relevant only if an effective repudiation had occurred, and then would be relevant only insofar as prior attainment of majority status would bar a subsequent repudiation. (Pet.App., pp. 6-7.) The Court of Appeals held further that a defense of alleged coercion in the signing of a § 8(f) agreement cannot be raised as a defense in a § 301 suit. (Pet.App., pp. 8-9.)

SUMMARY OF THE ARGUMENT.

This case presents for decision whether an agreement made pursuant to § 8(f) of the Act is enforceable in a § 301 suit before the union attains majority status among employees covered by the agreement. The case also requires the Court to decide whether an employer may avoid its contract obligations under a § 8(f) agreement by conduct other than filing a § 9 election petition, and to clarify the effect of such events on judicial enforcement of the agreement.

The Court of Appeals correctly granted enforcement of the Agreement between McNeff and Local 12 from the signing of the Agreement on September 13, 1978, through the end of the period covered by the payroll audit on April 30, 1979. McNeff signed the Agreement in order to remain eligible for work on a construction site, then enjoyed the benefits of the Agreement while complying with its terms in certain respects and breaching its terms in other respects. The Court of Appeals further held correctly that alleged coercion to obtain the signing of the Agreement could not be presented as an affirmative defense to enforcement of the Agreement in a § 301 action.

The holdings of the Court of Appeals are supported by the provisions and policies of the Act, particularly § 8(f), and §§ 301 and 302(c)(5) of the Labor Management Re-

lations Act ("LMRA"). The statutory design is intended to function as follows:

> A union and an employer in the construction industry may voluntarily enter into an agreement pursuant to § 8(f), and the agreement will be judicially enforceable as any other contract in an action under § 301. However, the employer may raise a defense that the NLRB has issued a certification of election results under § 9 of the Act establishing that the union does not have majority status among employees covered by the agreement. Rights accruing under the agreement prior to the date of the Board's certification are judicially enforceable; terms of employment occurring after that date may be set free of the agreement. The administration of construction industry employee representation issues arising under the Act is retained in the regular channels of the Board as the authorized expert administrative agency, rather than placing such issues in the already crowded litigation arena of federal and state courts.

The Agreement between Local 12 and McNeff is a valid contract on its face, and would ordinarily be enforceable unless in violation of a federal statute. When interpreting any statute, the language of the statute is conclusive in the absence of a clearly expressed legislative intention to the contrary. *Consumer Product, etc. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056 (1980). The express language of § 8(f) states that "[i]t shall not be an unfair labor practice . . . to make an agreement . . .", and says nothing specifically authorizing either party to "repudiate" or otherwise avoid the promised performance under such an agreement. However, the last *proviso* of § 8(f) states that any such agreement "shall not be a bar to a petition filed under § 9(c) or 9(e)" of the Act. 29 U.S.C. § 158(f). Thus, the only avenue within the language of § 8(f) for calling into question the continued effectiveness

of the agreement is contained in the context of a petition for a representation election filed with the NLRB by the employees, the union or the employer.

The history of § 8(f) does not show "a clearly expressed legislative intention" that employers be able to avoid their agreements by means other than filing a § 9 petition. To the contrary, the legislative history actually shows a clear intent that agreements authorized by § 8(f) be binding contractual commitments of the parties, because "it is necessary for the employer to know his labor costs" before preparing bids for construction contracts, and "the employer must be able to have available a supply of skilled craftsmen ready for quick referral." *NLRB v. Local Union No. 103, Iron Workers* ("*Iron Workers*"), 434 U.S. 335, 348, 98 S.Ct. 651, 659 (1978). The legislative history further shows that Congress authorized prehire agreements to establish terms of employment in advance because experience showed that representation elections were not feasible under the working conditions of the construction industry. *Id.*, 434 U.S. 349, 98 S.Ct. at 659. Congress intended to tailor the Act to accommodate the practical environment faced by construction trade unions in organizing workers and stabilizing employment conditions.

The *Iron Workers* decision of this Court does not support adding court-made avenues to the express statutory provision by which an employer may avoid performance under a § 8(f) agreement. The *Iron Workers* decision held that the existence of a § 8(f) agreement does not enable a union to picket an employer free of the statutory limitations of § 8(b)(7)(C). Likewise, in this case an employer should not be permitted to avoid its agreement entered into pursuant to § 8(f), except according to the express *proviso* of § 8(f) authorizing the filing of an election petition. In characterizing a § 8(f) agreement as "voidable" in *Iron Workers*,

434 U.S. at 341, 98 S.Ct. at 655-56, this Court acknowledged only the rights under § 8(f) of the employees, the employer and the union to petition for an election under § 9 of the Act as the appropriate avenues for avoiding the agreement. *Id.*, 434 U.S. at 345, 349, 98 S.Ct. at 657, 659.

The views expressed in *Higdon* that union majority status might be subject to litigation as a defense in a § 301 suit did not purport to decide the issue, and were expressed to counter the union's argument that having judicially enforceable § 8(f) agreement precludes applying the limits of § 8(b)(7)(C) to the union's picketing. The reverse argument now made by the employer, *i.e.*, that the application of § 8(b)(7)(C) to restrict union picketing as set forth in *Higdon* precludes treating the § 8(f) agreement as judicially enforceable, is equally fallacious and likewise should be rejected.

The intent of Congress that the decision of an employer *to enter into* a § 8(f) agreement should be voluntary does not imply that the employer's decision to agree should be free of all economic considerations. Neither does voluntariness in *entering into* the agreement imply that the promise to perform is to be at all times "at will" and subject to immediate repudiation, either by simple breach or by explicit notification. The fundamental policy of the Act to promote labor peace and stability, the policy of § 301 that agreements made in the context of collective bargaining should be enforceable according to the terms and intent of the parties, the policy of § 302(c)(5) that an employer's obligation to pay to employee trusts should be in writing and reliable, and the objective of § 515 of ERISA that judicial enforcement of employee benefit contributions be simple and inexpensive, run directly contrary to such an interpretation of § 8(f).

If a union's coercive conduct in obtaining a prehire agreement were to deprive the agreement of the protection of § 8(f), then by the express language of the statute ("It shall not be an unfair labor practice . . .") the union's conduct would be subject to the prohibition or protection of § 8(a) and (b) of the Act. Regulation of such conduct is within the primary jurisdiction of the NLRB and outside the § 301 jurisdiction of the courts. Therefore, McNeff's allegation of coercive conduct by Local 12, while factually unsupported in the record, is not a valid defense in a § 301 suit.

ARGUMENT.

I.

AN AGREEMENT PERMITTED BY § 8(f) IS JUDICIALLY ENFORCEABLE FOR THE FULL TERM ACCRUING PRIOR TO THE DATE THE NLRB CERTIFIES ELECTION RESULTS ESTABLISHING LACK OF UNION MAJORITY STATUS.

A. The Express Language of § 8(f) Provides Only for the Filing of a § 9 Petition as a Means of Avoiding the Terms of Agreement.

Although the Agreement between McNeff and Local 12 is a valid contract on its face, signing such an agreement without a showing of majority status by Local 12 would have been unlawful under the unfair labor practice provisions of § 8(a) and 8(b) of the Act, except for the enactment of § 8(f). *Garment Workers v. NLRB*, 366 U.S. 731, 737, 81 S.Ct. 1603, 1607 (1961). Administration and enforcement of the unfair labor practice statutes have been placed by Congress under the primary jurisdiction of the NLRB. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773 (1959).

In suits such as this under § 301 of the LMRA, " . . . courts [are] free to interpret and enforce collective bargaining agreements even where that process may involve condemning or permitting conduct arguably subject to the protection or prohibition of the [Act]", but this principle "is applicable only to those disputes that are governed by the terms of the collective bargaining agreement itself." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 300-301, 91 S.Ct. 1909, 1925 (1971). However, ". . . the basic policies found controlling in an unfair labor practice context may [not] be disregarded by the courts in a suit under § 301 . . ." *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 256, 94 S.Ct. 2236, 2240

(1974). Accordingly, determining the extent to which agreements signed pursuant to § 8(f) will be enforced in a § 301 suit involves interpretation of § 8(f) and consideration of the basic policies underlying its enactment.

> "[T]he starting point for interpreting a statute is the language of the statute itself. *Absent a clearly expressed legislative intention to the contrary*, that language must ordinarily be regarded as *conclusive*." (Emphasis added.)
>
> *Consumer Product, etc. v. GTE Sylvania, Inc., supra*, 447 U.S. at 108, 100 S.Ct. at 2056.

The operative language of § 8(f) is as follows:

> "It shall not be an unfair labor practice . . . for an employer . . . to make an agreement covering employees engaged . . . in the building and construction industry with a labor organization . . . because (1) the majority status of such labor organization has not been established under the provisions of § 9 of this Act prior to the making of such agreement . . .: *Provided* . . ., That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to § 9(c) or 9(e)." 73 Stat. 545, 29 U.S.C.A. § 158(f). See, *infra*, App., pp. 1-2.

The words of the statute authorizing the union and the employer "to make an agreement" are readily understood as enabling the parties to enter into a written contract, as has occurred in this case. Nothing in the words of the statute reserve a right for either party to the agreement to avoid the obligations undertaken by simple disavowal or repudiation. This Court has stated that § 8(f) "explicitly contemplates contracts" within the meaning of § 301. *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17, 27, 82 S.Ct. 541, 547 (1962).

Further examination of § 8(f) leads to the language of the last *proviso* which states, in effect, that if the majority status of the union has not been established under § 9 of the Act, the § 8(f) agreement "*shall not be a bar to a petition*" filed under § 9(c) or 9(e). Again, the meaning of the statute is explicit: the NLRB is not to treat a § 8(f) agreement as a bar to the regular processing of a petition for election filed by the employees, the union or the employer under § 9 of the Act. The *proviso* does *not* say that the § 8(f) agreement is to be judicially unenforceable, or that the agreement is to be "at will" and terminable immediately by conduct or by notice until the union attains majority status. Therefore, unless "a clearly expressed legislative intention to the contrary" can be shown, the explicit language of § 8(f) providing only for the processing of a § 9 petition should be regarded as *conclusive*, and the conflicting interpretations urged on behalf of McNeff in this case should be rejected.

B. The Legislative History of § 8(f) Supports Judicial Enforcement of Such Agreements, at Least Until a Union Loss of Election.

The NLRB did not exercise jurisdiction over the building and construction industry until after the 1947 amendments to the Act. Even then, substantial differences existed between the requirements of the Act and the common practices of employers and labor organizations in the construction industry. In 1959, Congress sought to recognize the special circumstances of employment conditions in the construction industry and to make reasonable accommodations for those practices under the Act.

> "The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for

none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction." S.Rep.No. 187, 86th Cong., 1st Sess. 27 ("*Sen. Rep.*"), U.S. Code Cong. & Adm. News (1959), pp. 2318, 2344; I *Legislative History of the Labor Management Reporting and Disclosure Act of 1959* 423 ("*Leg. Hist.*").

"The clearest accommodation to the peculiar conditions of the construction industry" contained in the 1959 revisions of the Act was found in the provisions of § 8(f). *Pacific Northwest Chapter v. NLRB*, 654 F.2d 1301, 1309-1311 [9th Cir. (*en banc*) 1981]; *aff'd in pert. part, sub nom. Woelke & Romero Framing, Inc. v. NLRB*, ... U.S. ...., 102 S.Ct. 2071 (1982). The legislative history of § 8(f) records the customs and practices to be legitimized by § 8(f). *Id.*, 654 F.2d at 1309-1310. As described in the Senate Report:

> "In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps one year or in many instances as much as three years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated." *Sen. Rep.* at 28; I *Leg. Hist.* at 424.

The impetus for legislating approval of this practice involved accommodation of two particularly important *employer* interests:

> "One reason for this practice is that *it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based.* A second reason is that *the employer must be able to have available a supply of skilled craftsmen ready for quick re-*

ferral." (Emphasis added.) *Ibid.* See, *Iron Workers*, 434 U.S. at 348, 98 S.Ct. at 659.

However, Congress was motivated as well by the accommodation and protection of union and employee interests. Congress recognized that union representation elections in the construction industry "are not feasible to demonstrate . . . majority status due to the short periods of actual employment by specific employers." *Sen. Rep.* at 55; 1 *Leg. Hist.* at 451. Accordingly, "prehire" agreements were authorized by § 8(f) to enable unions and employers to "stabilize employment conditions in a particular geographic area over an extended period of time." *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859, 874 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 976 (1981).[2]

The legislative history makes clear that Congress envisioned binding contractual commitments that would assure employers of known future labor costs and a source of skilled craftsmen for construction projects, while enabling unions to stabilize employment conditions over a fixed period of time. However, while authorizing such prehire agreements, Congress was careful to make clear that the *making of* such agreements — *i.e.*, the employer decision to sign the agreement — was to be voluntary. *Iron Workers*, 434 U.S. at 348, n. 10, 98 S.Ct. at 659. As this Court has noted, the House floor leader of the legislation introduced "as an expression of legislative intent" a prior statement of Senator Kennedy regarding § 8(f):

> "Mr. Kennedy: I shall answer the Senator from Florida as follows — and it is my intention, by so answering,

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[2]Without the authority to secure prehire agreements, "[e]mployees . . . were often denied the benefits of union representation because of the temporary and sporadic nature of their employment." *Ruttman Construction Company*, 191 NLRB 701, 702 (1971).

> to establish the legislative history on this question: It was not the intention of the committee to require by [§ 8(f)] *the making of* prehire agreements, but, rather, to permit them; nor was it the intention of the committee to authorize a labor organization to strike, picket, or otherwise coerce an employer *to sign* a prehire agreement where the majority status of the union had not been established. The purpose of this section is to permit voluntary prehire agreements." (Emphasis added.) 105 Cong. R. 18128 (1959), II *Leg. Hist.* 1715.

This Court further noted:

> "The House Conference Report similarly stressed that '[n]othing in such provision is intended . . . to authorize the use of force, coercion, strikes or picketing to compel any person *to enter into* such prehire agreements.' H.R. Rep. No. 1147, 86 Cong., 1st Sess., 42 (1959); I *Leg. Hist.* 946, U.S. Code Cong. & Adm. News 1959, pp. 2318, 2514." (Emphasis added.) *Iron Workers*, 434 U.S. at 348, n. 10, 98 S.Ct. at 659.

This legislative history indicates no more than that Congress intended the employers' decision *to make, to sign, to enter into*, a § 8(f) agreement to be voluntary.[3] At the same time, once entered into, the agreement would be a binding contractual commitment of the employer and the union in order to achieve the other objectives previously discussed.

Obviously, the concept of continuing "voluntary observance" urged on behalf of McNeff[4] would enable an employer to avoid the agreement at any time by conduct or by notice. That concept, assuming reciprocal rights on the part

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[3]But see note 14, *infra*, p. 35.

[4]Pet.Br., p. 27. See, also, Pet.Br., pp. 23-25, arguing that § 8(f) agreements may be ignored without notice. But, *cf.*, Pet.Br., pp. 41-43, stating the intent of § 8(f) that agreements be "entered into voluntarily."

of both parties, would completely undercut the ability of an employer to contract for future labor costs and for a source of skilled labor. Surely Congress did not envision a union being entitled to sign a § 8(f) agreement, wait for the employer to win a construction project, then "repudiate" the agreement and demand higher wages or better working conditions when the employer is committed to proceed with the project. Likewise, if an employer is entitled to disavow its § 8(f) agreement at any time, construction unions would be severely damaged in their efforts to stabilize employment conditions in a geographic area over a period of years.

The care shown by Congress in making its intention clear "that prehire agreements were to be *arrived at* voluntarily" (emphasis added), *ibid.*, arose from the fundamental concern of Congress for the protection of the rights of employees to self-determination, and more particularly to protect against coerced designation of bargaining representatives. This Congressional concern was reflected most clearly in the enactment of § 8(b)(7). *Iron Workers*, 434 U.S. at 346-48, 98 S.Ct. at 658-59. However, as this Court recognized in *Iron Workers*, the concern of Congress for employee self-determination is also reflected in the last proviso to § 8(f).[5] This concern is fully protected by the preservation of § 9 petition rights, as determined by Congress. Creation of an employer right to ignore the agreement at will would do

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[5] "Hence the proviso that an election could be demanded despite the prehire agreement." 434 U.S. at 349, 98 S.Ct. at 659.

nothing to enhance employee self-determination, and would injure employee rights greatly.[6]

No clear legislative intention contrary to the express provisions of § 8(f) can be shown. Quite to the contrary, the legislative history actually reinforces the explicit language of the statute providing only for the right to file a § 9 petition unless majority status has been established. Thus, the language of the statute should be regarded as conclusive. *Consumer Product, etc. v. GTE Sylvania, Inc., supra.* Nothing supports the adoption of statutory policies which would enable an employer to avoid its own agreement by unilateral action.

C. Judicial Enforcement of § 8(f) Agreements Is Consistent With the Iron Workers Decision of This Court.

The support which McNeff seeks for immediate, "at will" avoidance of contract obligations is not to be found in the *Iron Workers* decision of this Court. *Iron Workers* holds that the existence of a § 8(f) agreement does not free a union from the statutory restraint of § 8(b)(7)(C) on picketing for recognition. In so holding, the Court let stand the view of the NLRB "that § 8(b)(7) applies to a minority

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[6]In comparing the protections afforded employee rights under the alternatives of unilateral employer "repudiation" of § 8(f) agreements *versus* judicial enforcement of such agreements to the date of NLRB certification of union loss of election, either alternative preserves the right of employee self-determination through a § 9 petition filed by the employer or the employees. However, the first alternative seriously undercuts employees' rights relating to terms and conditions of employment. If subject to employer "repudiation," employees would be "at risk" as to wages and fringe benefits until NLRB certification of majority status in every bargaining unit — an approach Congress regarded as "not feasible." Clearly, the alternative most protective of employee rights lies in the enforcement of contract rights arising under § 8(f) agreements until the NLRB certifies that the concerned employees have voted against further union representation.

union picketing to enforce a prehire contract", 434 U.S. at 349, 98 S.Ct. at 659, on grounds that "[n]othing in the language or purposes of either § 8(f) or § 8(b)(7) forecloses this application of the statute." *Id.*, 434 U.S. at 346, 98 S.Ct. at 658. In other words, § 8(f) need not be read as authorizing picketing for more than 30 days to obtain union recognition, where employees have not "been given a chance to vote on the question of representation", and when the Congressional view as expressed in § 8(b)(7)(C) was that "[p]icketing in these circumstances . . . impermissibly interfere[s] with the employees' freedom of choice." *Id.*, 434 U.S. at 346-47, 98 S.Ct. at 658.

In the *Iron Workers* decision, this Court held the union to the express requirements of § 8(b)(7) of the Act and refused to read into § 8(f) broader implications than are clear in its language and legislative history. By similar analysis, the Court should reject the employer's effort in this case to read into § 8(f) broader implications which would enable the employer to avoid its consensual obligations without involving the election processes of the Board. In the same manner that Congress could have written explicit language overriding § 8(b)(7) upon the signing of a § 8(f) agreement, if such had been its content, Congress could have stated explicitly that § 8(f) agreements are to be at all times "at will" and subject to immediate or retroactive repudiation by the employer before majority status is attained by the union. Congress did not do so, and no basis can be found for adding such an effect to § 8(f) more than twenty years after its passsage. Surely such a unique characteristic of prehire agreements would have been explicit in the statute, clear in the legislative history, and immediately known to all advocates for the contending forces in the legislative effort. Such has not been the case.

As *Iron Workers* held that a union cannot *enforce* a § 8(f) agreement except subject to the strictures of statute [§ 8(b)(7)], the employer in this case should not be permitted to *avoid* a § 8(f) agreement except according to the provisions of statute — *i.e.*, by petitioning for an election under § 9 as set forth in the *proviso* to § 8(f).

Iron Workers did not purport to decide whether a § 8(f) agreement is judicially enforceable, or whether a union's majority standing is subject to litigation in a § 301 suit to enforce the § 8(f) agreement.[7] In *Iron Workers*, the union asserted that § 8(f) agreements are judicially enforceable, citing *Retail Clerks International Association v. Lion Dry Goods, Inc., supra*, for that premise, and argued that *judicial enforceability precluded applying § 8(b)(7)* to restrain picketing to enforce the agreement. This Court responded by pointing out that *Lion Dry Goods* held only that § 8(f) agreements are contracts within the meaning of § 301, but that such a contract might still be unenforceable due to lack of majority status. While the logic of the Court's theoretical analysis is valid, the flaw in logic actually occurred in the union's original premise, thereby making the Court's response unnecessary. *The judicial enforceability of a § 8(f) agreement simply does not preclude application of § 8(b)(7) to restrain union picketing*. The two concerns are almost totally separate. *Nor is the reverse of that premise so*, as the employer urges in this case. The application of § 8(b)(7) to restrain union picketing for recognition, as required by *Iron Workers*, does not preclude judicial enforcement of the existing § 8(f) agreement. The *Iron Workers* decision ex-

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[7]McNeff insists to the contrary. Pet.Br., p. 37. But clearly, in *Iron Workers* this Court had before it neither a § 301 case nor the issue of any available defense in such a case.

plains that the Board's interpretation of the statute "does not . . . render § 8(f) meaningless." 434 U.S. at 349, 98 S.Ct. at 659. To support that precise point, the Court then states by footnote as follows:

> "A comparable situation obtains concerning hot-cargo clauses, which are permitted in the construction industry by § 8(e), 29 U.S.C. § 158(e), but which cannot be enforced by picketing." *Ibid.*

In that "comparable situation," hot cargo agreements within the scope of the construction industry proviso to § 8(e) are lawful, *Woelke & Romero Framing, Inc. v. NLRB*, ... U.S. ....., 102 S.Ct. 2071, 2076-2080 (1982), and are enforceable in § 301 suits. *Brogan v. Swanson Painting Co.*, 682 F.2d 807 (9th Cir. 1982). *Cf., Kaiser Steel Corp. v. Mullins*, ... U.S. ....., 102 S.Ct. 851, 859-860 (1982), holding that an agreement may be tested for lawfulness under § 8(e) before enforcement is granted in a § 301 suit.

The clear implication of this Court's parallel analysis in *Iron Workers* is that the meaning retained by § 8(f), like § 8(e), encompasses judicial enforcement of the agreement made, while picketing to enforce § 8(e) and § 8(f) agreements is restricted by § 8(b)(4) and § 8(b)(7), respectively.

Other comparable situations exist under collective bargaining law in which agreements made are judicially enforceable, although not enforceable by economic action. Perhaps the most commonly occurring example involves agreements reached on non-mandatory subjects of bargaining. An unfair labor practice occurs if economic action is used to obtain an agreement on a non-mandatory, permissive subject of bargaining, *NLRB v. Wooster/Borg-Warner Corp.*, 356 U.S. 342, 349, 78 S.Ct. 718, 722-723 (1958), but otherwise such agreements are enforceable. *Ibid.* At the same time that an agreement on a permissive subject of

bargaining is "enforceable if agreed to" by the parties, *ibid.*, no unfair labor practice occurs under § 8(a)(5) or § 8(b)(3) if one of the parties makes a "unilateral change" in violation of the agreement. *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185, 92 S.Ct. 383, 400 (1971). In this light, the Board view enforced in *Iron Workers* that no violation of § 8(a)(5) occurs by the breach of a § 8(f) agreement until union majority status is established simply does not carry the necessary implication that the breach cannot be remedied in a § 301 suit.[8]

In *Pittsburgh Plate Glass*, the primary question presented was "whether a mid-term unilateral modification that concerns, not the benefits of active employees, but the benefits of already retired employees . . . constitutes an unfair labor practice." *Id.*, 404 U.S. at 159-160, 92 S.Ct at 387-388. In concluding that a retired employee is not an "employee" within the meaning of the Act and that benefits for a retired employee is only a permissive subject of bargaining, the Court decided that no unfair labor practice occurs under § 8(a)(5) when the employer changes such benefits during

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[8]An unfair labor practice proceeding is ". . . government litigation to enforce carefully drafted prohibitions . . ." *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 221-222, 82 S.Ct. 1328, 1342 (1962) [dissenting opinion adopted by majority in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 90 S.Ct. 1583 (1970)].

> "A proceeding by the Board is not to adjudicate private rights but to effectuate a public policy." *NLRB v. Industrial Union*, 391 U.S. 418, 424, 88 S.Ct. 1717, 1721 (1968).

The Board's view that "government litigation" should not be pursued to enforce a § 8(f) agreement which is not shown to be the instrument of the majority of employees covered is reconcilable with the policies of the Act (see *Iron Workers*, 434 U.S. at 343-344, 350, 98 S.Ct. at 656-657, 660) and with the administrative need to conserve scarce agency resources. However, the unavailability of "government litigation" under § 8(a)(5) to enforce a § 8(f) agreement does not, as McNeff contends, foreclose the use of a § 301 suit as the proper forum "to adjudicate private rights" created by the agreement of the parties.

the term of a collective bargaining agreement. The Court finally concluded:

> "The remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract, see n. 20, *supra*, not in an unfair labor practice proceeding." *Id.*, 404 U.S. at 188, 92 S.Ct. at 402.

At its note 20, *Pittsburgh Plate Glass* explains that the retired employees could pursue a § 301 suit to remedy the employer's change in their benefits, even though no unfair labor practice had occurred. *Id.*, 404 U.S. at 181, n. 20, 92 S.Ct. at 398-399.

Likewise in the case of an agreement permitted by § 8(f), the remedy for breach lies in a § 301 suit rather than a § 8(a)(5) proceeding.

> "Once parties have made a collective bargaining contract the enforcement of the contract should be left to the usual processes of the law and not to the National Labor Relations Board." *Id.*, 404 U.S. at 186-187, 92 S.Ct. at 401, quoting from the House Conference Report on § 301.

Agreements made under § 8(f) are intended to be judicially enforceable, and the *Iron Workers* decision is entirely consistent with that outcome.

D. Decisions of the NLRB Reflect a View of § 8(f) and of the Iron Workers Decision Which Is Compatible With Judicial Enforcement of § 8(f) Agreements Prior to the Board's Certification of Union Loss of Election.

In a more recent § 8(b)(7) case, *International Union of Operating Engineers, Local 150 (Tri-City Excavating, Inc.)*, 255 NLRB No. 83, 106 LRRM 1399 (1981), the Board added context to its views enforced in *Iron Workers*

by holding that picketing beyond 30 days without filing a § 9 petition does not violate § 8(b)(7)(C) when the purpose of the picketing is limited to enforcing the payment of past due fringe benefit contributions accrued under the § 8(f) agreement. In accord with its analysis in *Iron Workers*, the Board proceeded by determining "whether an object of the picketing was recognitional." The Board distinguished *Iron Workers* as follows:

> "In [Iron Workers] . . . [s]atisfaction of the picketing demands there would have required current application of the 8(f) contract, including recognition of the labor organization as bargaining representative. . . . Unlike that situation, the 'enforcement' sought by [Local 150's] picketing was payment of an alleged past obligation under the 8(f) contract and did not require current application of the contract." *Id.*, 106 LRRM at 1403.

This decision of the Board illustrates that the essential context of *Iron Workers* was the regulation of picketing for recognition, and should put aside any notions that the Board views § 8(f) agreements as "at will" arrangements which may be avoided unilaterally either by breach or by notice.

A further development of the context within which the Board views § 8(f) agreements is provided by a recent decision in a representation case, *Giordano Construction Co. (Carpenters, Local 1205)*, 256 NLRB No. 10, 107 LRRM 1164 (1981). In *Giordano*, the regional director of the Board had found that the union had achieved majority status in a permanent work force before the filing of the § 9 petition by the employer, thereby causing the § 8(f) agreement to mature into a § 9 relationship and providing a contract bar to the petition. However, the Board disagreed, finding that the work force of the employer was never sufficiently stable during a period of almost two years to provide a basis upon

which the union could make a showing of majority status. In the absence of such a permanent and stable work force, majority status sufficient to bar an election could be established only on a jobsite-by-jobsite basis. Accordingly, since the employer had no current jobsite on which prior attainment of majority status could be established by the union, the § 8(f) agreement could not provide a bar to the election, and the Board ordered the § 9 petition reinstated.[9]

The *Giordano* decision is instructive in several respects. First, the employer filed a § 9 petition to test the representation views of eligible employees, rather than contending that the § 8(f) agreement was automatically avoided by its breach, or by repudiation, or by any other unilateral action of the employer. Second, the decision illustrates the special difficulties faced by a construction union in attempting to satisfy the Board's requirements for establishing a contract bar to an election, and the concomitant readiness of the Board to conduct an election among construction industry employees except under very limited circumstances. Third, the case shows that the Board does not view § 8(f) agreements as noncontractual arrangements which may be unilaterally abandoned; the Board did not treat the § 8(f) agree-

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[9]McNeff seriously misconstrues the Board's readiness to conduct an election unless majority status is shown in a permanent and stable work force. McNeff argues that an employer may decide unilaterally to apply a § 8(f) agreement at a "union" jobsite and to ignore the agreement at a "nonunion" jobsite, even though the agreement expressly covers all jobsites of the employer. Pet. Br., pp. 32-33. Of course, the "union" and "nonunion" classification begs the question whether the agreement applies to a jobsite, because the jobsite will be "union" if the agreement is honored and enforced there. The salient point remains, however, that the Board's willingness to conduct an election under § 9 of the Act unless majority status in a permanent and stable work force can be shown does not release the employer's obligation to perform according to the consensual agreement, at least until the Board certifies a union loss of election.

ment as a nullity upon finding a lack o majority status, but merely held that the agreement would not bar an election and reinstated the § 9 petition.

E. Terms of Employment Should Be Fixed by the § 8(f) Agreement and Judicially Enforceable at Least Until the Date the NLRB Certifies Election Results.

To demonstrate the meaning of the Board's view that a prehire agreement is "voidable" until union attainment of majority status, this Court in *Iron Workers* quite properly acknowledged *only* the rights of the employees, the employer and the union to petition for an election under § 9 of the Act as the appropriate avenue for avoiding the agreement.[10] With the filing of a § 9 petition as the appropriate means for calling into question the majority status of the union, the question arises whether the date of filing the petition should have any significance for the judicial enforcement of the § 8(f) agreement. In other words, should the filing of the § 9 petition itself interrupt the judicial enforcement of a § 8(f) agreement, or should judicial enforcement proceed without interruption at least until the date on which the NLRB certifies the results of the union representation election?

Nothing in the language of § 8(f) causes the terms of the § 8(f) agreement to be interrupted by the filing of a § 9 petition. The filing of the petition merely calls in question

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[10]This Court's statements in *Iron Workers* are as follows:

(1) "The employer and its employees — and the union itself for that matter — may call a bargaining representative election at any time." 434 U.S. at 345, 98 S.Ct. at 657.

(2) "The proviso expos[es] unions with prehire agreements to inquiry into their majority standing by elections under § 9(c) . . ." *Ibid.*

(3) "Hence the proviso that an election could be demanded despite the prehire agreement." *Id.*, 434 U.S. at 349, 98 S.Ct. at 659.

the majority status of the union — a question properly raised by the employer, the employees, or the union. See note 10, *supra*. The fact that the union's majority status is open to question certainly would not invalidate a § 8(f) agreement, since the statute squarely permits such agreements at times, including "prehire", when the union undoubtedly has not established majority status. Moreover, although a petition has been filed, a satisfactory showing of prior attainment of majority status will bar the petition, and no election will be held.

> "[W]hen the union successfully seeks majority support, the prehire agreement attains the status of a collective bargaining agreement executed by the employer with a union representing a majority of the employees in the unit." *Iron Workers*, 434 U.S. at 350, 98 S.Ct. at 660.

Accordingly, whether "majority support" is established administratively through the General Counsel of the Board in order to raise a "contract bar" to a § 9 petition, or is established upon the Board's certification of election results, the terms of employment set forth in the prehire agreement continue in effect as the chosen instrument of parties to a § 9 collective bargaining relationship.

Obviously, the agreement would be judicially enforceable after attainment of majority status by either method. Under that circumstance, no good reason can be advanced for creating a period of *hiatus* between the filing of the petition and the date of final Board action on the petition, during which the judicial enforceability of the § 8(f) agreement would be in doubt. *Hiatus* in judicial enforceability of the § 8(f) agreement during the pendency of a § 9 petition would create unnecessary and desirable instability in the labor environment. Under conditions of *hiatus*, the employees could not be certain whether to rely upon the terms, including

fringe benefits, of the § 8(f) agreement or to bargain individually with their employer concerning wages, hours and working conditions. Moreover, trustees of employee benefit trusts would not know whether to provide medical insurance and other benefits to such employees in the interim, if judicial enforcement of employer contributions could later be denied in the event the union loses the Board election.

One of the fundamental policies of the Act, and of § 8(f), is to promote stability in labor relations. 29 U.S.C.A. § 151. *Infra*, pp. 37-39. A § 8(f) agreement should be judicially enforceable as a contract setting the terms of employment at least until the date on which the Board certifies election results showing that the union has failed to win a majority of votes cast.[11] In this case, such a certification by the Board occurred on November 17, 1980, well after the date of April 30, 1979, through which the judgment of the district court enforced the Agreement between McNeff and Local 12.

II.

PERMITTING AN EMPLOYER TO AVOID JUDICIAL ENFORCEMENT OF A § 8(f) AGREEMENT BY MEANS OTHER THAN FILING A § 9 PETITION WOULD UNWISELY REQUIRE STATE AND FEDERAL COURT LITIGATION OF EMPLOYEE REPRESENTATION ISSUES ARISING IN THE CONSTRUCTION INDUSTRY.

A. If "Repudiation" by the Employer's Unilateral Conduct Is a Defense in a § 301 Action, Then Union Majority Status Must Be Litigated to Determine Whether the § 8(f) Agreement Presents a "Contract Bar" to the Repudiation.

If an employer may avoid future performance under a § 8(f) agreement only by filing a § 9 petition which results in a union loss of election, the determination of all issues

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[11] Whether a § 8(f) agreement is binding or may lawfully be observed after a union loss of election under arious circumstances, such as an unstable work force, is an issue not presented by this case.

concerning employee representation will be handled according to the normal processes of the NLRB. Those processes would ultimately involve self-determination by the employees as to whether the agreement signed by the employer and the union should remain in effect. On the other hand, if the employer may take unilateral action to avoid the § 8(f) agreement, such as by giving formal notice of repudiation or engaging in other "bald conduct" indicating a repudiation (Pet. App., p. 8), then the employer's "repudiation" could be presented as an affirmative defense against judicial enforcement of the § 8(f) agreement in a § 301 suit.

If repudiation is available to the employer at all, the repudiation must occur prior to the union's attainment of majority status. *Iron Workers*, 434 U.S. at 350, 98 S.Ct. at 660. Therefore, as the Court of Appeals recognized (Pet. App., pp. 7-8), whenever an employer raises the defense and proves a repudiation, whether the union attained majority status before the date of repudiation becomes relevant. Since state courts have concurrent jurisdiction with federal courts over § 301 actions to enforce labor agreements, *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 82 S.Ct. 519 (1962), employee representation issues previously reserved for determination by the NLRB would be subject to litigation in § 301 suits brought in state courts as well as federal courts.

B. Determining Majority Status Involves a Wide Range of Employee Representation Issues Heretofore Administered by the NLRB.

Determining whether union majority status was attained prior to an employer repudiation involves more than the "[r]e-creation of past relationships for the purpose of resolving factual disputes . . ." (Pet. App., p. 8.) Since a

"majority" can be established logically only in relation to a particular "whole", a court seeking to establish majority status would necessarily be required to determine the "appropriate bargaining unit" of employees eligible to participate in selecting the bargaining representative. Of course, according to "the distribution of authority made by Congress . . .", determining the appropriate bargaining unit is ordinarily subject to the discretionary authority of the NLRB. *South Prairie Construction Company (Local 627, International Union of Operating Engineers*, 425 U.S. 800, 806, 96 S.Ct. 1842, 1845 (1976). *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491, 67 S.Ct. 789, 793 (1947). In § 301 suits, the discretion available for exercise by the Board in making unit determinations would be wielded instead by the courts deciding majority status issues — a course of action viewed by the Court of Appeals as improper in other contexts. *Local 3-193, International Woodworkers v. Ketchikan Pulp Company*, 611 F.2d 1295, 1299, 1301 (9th Cir. 1980).

In addition, the state and federal courts would be required to determine the eligibility of particular employees to participate in selection of a bargaining representative. That concern reaches its most complex proportions under the employment conditions of the construction industry, a circumstance which had led Congress to conclude that Board representation elections "are not feasible" as a prerequisite to collective bargaining. *Sen. Rep.* at 55; 1 *Leg. Hist.* at 451. In the construction industry, the Board has designed a unique voter eligibility rule. *Daniel Construction Company, Inc. (United Association, etc.)*, 133 NLRB 264, 48 LRRM 1636 (1961).

Assuming the appropriate bargaining unit has been determined and the eligible employees have been identified, the courts would then face additional issues in considering

the adequacy of proof of union support among employees in the unit. Even union membership has not always been treated as conclusive proof of union support. At the same time, absence of union membership, while the employee is receiving the benefits of a § 8(f) agreement and refraining from filing a § 9 petition to question the union's status as bargaining representative, likewise may be unreliable proof of *lack* of union support.

The proper determination of each of these issues in every particular case involves important use of the Board's discretion in achieving the policies of the Act. For example, whenever the Board is establishing the rules for determining majority status, or determining majority status in a particular case, a paramount consideration for the Board is the policy of the Act favoring a secret ballot election in which employees actually vote. In such circumstances, the rules and decisions of the Board reflect, quite properly, a discretionary bias in favor of holding the election and against finding a "contract bar". Frequently such decisions must be made in a total context involving economic strikers, unfair labor practice strikers and strike replacements. Such important discretion in administering the Act is best exercised on a case by case basis and, according to Congressional design, by the Board.

C. Private Litigation in State and Federal Courts Is Not a Suitable Arena for Determination of Employee Representation Issues.

The courts have no access to a secret ballot election process in which employees may ultimately express support or nonsupport for a union representative. Thus, the focal point of the Board's administration of employee representation issues under the Act is entirely missing from the processes of the courts. As a result, even if the courts were entirely

familiar with the Board's views and decisions relating to employee representation issues, those views and decisions would require complete reassessment in light of the importantly different circumstance facing the courts. Stated another way, the Board itself would likely establish different rules and make different discretionary decisions on employee representation issues *if no secret ballot election were available* as a culmination of its inquiry.

When the General Counsel of the NLRB rules that the union has failed to provide sufficient proof of prior attainment of majority status, the ultimate result is an election to decide the issue. By comparison, if a court determines a lack of majority status, no election is held in which the employees are permitted to affirm by secret ballot their support for continuation of the collective bargaining agreement; the employer would simply be permitted to repudiate and abandon the agreement. These important distinctions in the processes and outcome of court/Board inquiries into majority status, together with the prospect of a great multiplicity of courts rather than a single, expert administrative agency making the decisions, show the high risk of major distortions in the administration of the Act flowing from § 301 litigation of employee representation issues.[12]

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[12]Moreover, the courts themselves are already over-burdened with litigation, and can scarcely afford broadened responsibility for new disputes previously relegated by Congress to resolution by administrative agencies. Indeed, a strong case can be made for lightening the current caseload of the courts by legislatively moving more types of disputes to administrative tribunals. Aside from Congressional action, however, judicial restraint would surely seem to foreclose a wholesale removal of employee representation disputes from the NLRB to the courts.

D. Court Adjudication of Employee Representation Issues Would Adversely Displace the NLRB's Administrative Discretion and Authority Under the Act.

Not all effects of court litigation of employee representation issues on the functioning and jurisdiction of the NLRB can be anticipated. However, some of the adverse consequences are obvious and some additional effects are apparent upon consideration of the interplay among private parties, the courts and the Board. Employers certainly could not be expected to file § 9 petitions, involving possible affirmance of union support and continuation of the collective bargaining agreement in effect, when the alternative is immediate repudiation with only the risk of proof of past union support. For a variety of similar reasons, courts would become the preferred forum for employee representation disputes, and the Board would lose much of its jurisdiction and influence in the process. Employees and unions might still file § 9 petitions, but even that event would present difficult problems of comity concerning prior court decisions on related issues.

Of course, this barely scratches the surface of the implications of court encroachment upon the statutory jurisdiction of the Board. The decisions of this Court have considered the subject in much greater detail in cases involving conduct within the unfair labor practice provisions of the Act, *Garner v. Teamsters*, 346 U.S. 485, 490-491, 74 S.Ct. 161, 165 (1953), *San Diego Building Trades Council v. Garmon*, *supra*, and the extent to which § 301 provides an exception to the preemptive jurisdiction of the NLRB, *Motor Coach Employees v. Lockridge*, *supra*, 403 U.S. at 300, 91 S.Ct. at 1925. A recent decision of the Court of Appeals has considered the primary jurisdiction doctrine in the context of whether an employe[illegible]may raise lack of union majority

status as a defense in a § 301 suit to enforce a collective bargaining agreement which is *not* a § 8(f) agreement. *Glaziers & Glassworkers Local Union No. 767 v. Custom Auto Glass Distributors*, ___ F.2d ___, No. 79-4199 (9th Cir., Oct. 12, 1982). After considering the doctrine in light of this Court's decision in *Kaiser Steel Corp. v. Mullins*, *supra*, and the decisions in *Iron Workers* and *Lion Dry Goods*, *supra*, as well as the impact of § 10(b) of the Act, the Court of Appeals in *Glaziers* concluded as follows:

> "[T]he Employers are precluded from asserting, as a defense to the section 301 action, that the Union lacked majority status at the time of the execution of the collective bargaining agreement because of the preemption of this issue under the primary jurisdiction doctrine." ___ F.2d at ___.

The enactment of § 8(f) provides not the slightest hint of a "legislative determination" that courts should be empowered to begin deciding employee representation issues which are at the heart of Board jurisdiction. Section 8(f) itself was, of course, placed by Congress in the *centrum* of Board jurisdiction over unfair labor practices: § 8. In the absence of such a clear legislative determination, the Court should not interpret § 8(f) in a manner which revises the boundaries of Board jurisdiction and enlarges § 301 jurisdiction by such major proportions.

E. Exclusive NLRB Administration of Employee Representation Issues Will Be Preserved by Holding That an Employer's Ability to Avoid the Terms of Its § 8(f) Agreement Is Limited to Filing a § 9 Petition.

The significant dangers of displacing Board jurisdiction and adding burdens to court caseloads are created entirely by the proposition that new meaning, unsupported by lan-

guage or legislative intent, should be read into § 8(f) — *i.e.*, that employers are intended to have the right to avoid § 8(f) agreements by unilateral action without invoking the election process of the Board, so long as the union cannot prove prior attainment of majority status. On the other hand, the jurisdiction of the Board is entirely preserved and employee representation issues are kept out of the trial courts by the statutory interpretation which relies straight-forwardly on the language and express legislative intent of § 8(f).[13]

By treating the filing of a § 9 petition as the only means for an employer or the covered employees to avoid the terms of a § 8(f) agreement, all employee representation issues will be determined according to the statutory administrative processes of the Board. As set forth in the *proviso* to § 8(f), the Board will proceed directly to an election on a § 9 petition without regard to a § 8(f) agreement, unless the union can prove majority status has already been achieved. Thus, all issues concerning appropriate bargaining unit, eligibility of voters, permanency and stability of work force, and adequacy of showing of union support will be decided entirely within the § 9 proceedings.

If the Board determines that majority status has been shown, the § 9 petition will be dismissed and the collective bargaining agreement will continue to be judicially enforceable. If the Board proceeds to conduct an election and the union wins majority support, the collective bargaining agreement will continue to be judicially enforceable. On the

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[13]McNeff's arguments regarding whether the Board or the courts should decide employee representation issues seem to be at odds. On the one hand, McNeff asserts (erroneously) that *Iron Workers* already requires litigation of majority status in § 301 suits. Pet.Br., p. 37. On the other hand, McNeff argues that the district court was required to defer to the election processes of the Board for determination of employee representation issues. Pet.Br., pp. 37-39.

other hand, if the Board certifies election results showing lack of majority status, that certification can be easily proved as a defense to enforcement of the agreement from that date forward.

III.

IF AN AGREEMENT OBTAINED BY A UNION'S COERCIVE CONDUCT IS OUTSIDE THE INTENDED SCOPE OF § 8(f), THEN THE CONDUCT FALLS WITHIN THE SCOPE OF § 8(a) AND (b) OF THE ACT AND IS SUBJECT TO THE EXCLUSIVE JURISDICTION OF THE NLRB.

McNeff urges that proof of coercion by a union in obtaining a § 8(f) agreement should be permitted as an affirmative defense against enforcement of the agreement in a § 301 suit. Once again, the starting point in determining whether this result is supported by the statute is the language of § 8(f) itself. Section 8(f) states:

> "*It shall not be an unfair labor practice under subsections (a) and (b) of this section* for an employer . . . to make an agreement . . . with a labor organization . . ." (Emphasis added.) 29 U.S.C. § 158(f). *Infra*, Appendix, p. 1.

Thus, by the very words of the statute, the conduct involved in making an agreement is shielded from treatment as "an unfair labor practice" under § 8(a) and (b) of the Act, unless the conduct loses the protection of § 8(f) by falling outside the intended scope of the statute. As previously discussed, *supra*, pp. 14-16, Congress intended that the decision to enter into a § 8(f) agreement should be voluntary. Therefore, arguably an agreement arrived at involuntarily may fall outside the protection of § 8(f). If that were the case, the words "[i]t shall not be an unfair labor practice . . ." would not apply and the coercive conduct, as well as the resulting agreement, would fall squarely within the provisions of § 8(a) and (b) of the Act.

> "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Building Trades Council v. Garmon, supra*, 359 U.S. at 245, 79 S.Ct. at 780.

Without deciding the point, union picketing to obtain a prehire agreement may be viewed as a violation of § 8(b)(1)(A) as interference with the right of employees to self-organization. On the other hand, picketing to obtain a § 8(f) agreement may be viewed as picketing for union recognition, as in *Iron Workers*, and permitted within the limits of § 8(b)(7)(C).[14]

With alleged coercive conduct in obtaining a § 8(f) agreement so squarely governed by § 8 of the Act, no support can be found in § 8(f) or § 301 for opening such conduct to conflicting regulation by federal and state courts. A private party seeking relief from alleged coercion in obtaining a § 8(f) agreement should do so by filing an appropriate unfair labor practice charge with the Board,[15] or by filing § 9 petition for an election in which the employees may disavow the union representative.

In this particular case, Local 12 did not picket to obtain the Agreement with McNeff. McNeff signed the Agreement after being told by a superintendent of a general contractor, in the presence of a representative of Local 12, that McNeff

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[14]This Court has not yet decided the issue. See *Woelke & Romero, Inc. v. NLRB, supra*, ... U.S. ....., 102 S.Ct. at 2082, n. 17.

[15]One important reason for preempting the presentation of coercion as a defense in § 301 suits is that a charge filed with the Board is required to be timely within the limits of § 10(b) of the Act. *Cf., Glaziers & Glassworkers Local Union No. 767 v. Custom Auto Glass Distributors, supra*, holding that litigation of majority status in § 301 suits is preempted by the primary jurisdiction doctrine for this reason and others.

could continue work as a subcontractor on the construction project only if McNeff would sign an agreement with Local 12. As recently observed by this Court, a decision by a subcontractor to sign a § 8(f) agreement in order to remain eligible for work on a construction site in the face of enforcement of a "union signatory" subcontracting clause is a frequent occurrence. *Woelke & Romero, Inc. v. NLRB, supra,* .... U.S. ...., 102 S.Ct. at 2082.

The decision by McNeff to sign the agreement was voluntary in the sense that the employer could freely choose to sign the Agreement or discontinue working as a subcontractor on the construction project. A voluntary act is not distinguished from a coerced one merely by the absence or presence of economic considerations. Such considerations are undoubtedly present whenever a § 8(f) agreement is signed.

IV.

THE POLICIES OF THE ACT, OF THE LMRA, AND OF THE MORE RECENT AMENDMENT OF ERISA SUPPORT JUDICIAL ENFORCEMENT OF THE PARTIES' AGREEMENT ACCORDING TO ITS TERMS.

A. The Act Intends to Promote Stability in Labor Relations Through Encouragement of Agreements on Employment Conditions.

National labor policy has been erected on the basic premise that the law will require unions and employers to bargain in good faith, but otherwise the bargaining "parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *NLRB v. Insurance Agents,* 361 U.S. 477, 488, 490, 80 S.Ct. 419, 426-27 (1960). *NLRB v. Burns International Security Services, Inc.,* 406 U.S. 272, 282-

284, 92 S.Ct. 1571, 1579-1580 (1972). "One of [the] fundamental policies [of the Act] is freedom of contract." *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 102, 108, 90 S.Ct. 821, 823, 826 (1970). This heavy reliance upon freedom of contract wisely achieves improved stability in labor relations, and thereby promotes commercial productivity, through two important mechanisms. First, the contract itself actually sets forth the terms of performance expected from each of the parties, so that those terms become known quantities through relatively careful planning. Second, the existence of the contract then brings into play the natural rule of human conduct that "a person ought to do what the person has agreed to do." The strength of this second factor is demonstrated partly by the experience that, once an agreement has been made, the vast majority of employers, employees and unions abide by their agreements without need for intervention by the Board or the courts.

In that perspective, the Court should weigh carefully the potential impact of a decision that an employer need not perform as agreed. There can be no mistake that McNeff made a contractual commitment to abide by a written schedule of wages and working conditions for a period of time into the future. McNeff made that agreement knowing that Local 12 did not represent a majority of employees at the time. An agreement having been made, nothing should intervene to relieve the accepted obligation except the Congressional provision for a vote of the employees to disavow the bargaining representative. A holding by this Court that the Act contains an unwritten policy which by implication enables an employer to abandon a consensual contract would contain a message destructive to the purposes of the Act.

B. The Enactment of § 301 and § 302(c)(5) of the LMRA Intended to Assure Ready Access to a Forum for Enforcement of Written Contracts Covering Fringe Benefit Contributions.

The enactment of § 301 in 1947 reflected:

> ". . . a primary concern that unions as well as employees should be bound to collective bargaining contracts. But there was also a broader concern — a concern with a procedure for making such agreements enforceable in the courts by either party. . . .
>
> ". . . Thus collective bargaining contracts were made 'equally binding and enforceable on both parties.' " *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 453-454, 77 S.Ct. 912, 916 (1957).

The passage of § 301 provided authority for the development of a uniform body of federal substantive law based on "the policy of our national labor laws" to be applied in enforcing collective bargaining agreements. *Id.*, 353 U.S. at 456-457, 77 S.Ct. at 918. Indeed, this Court has held that the subject matter of § 301 "is peculiarly one that calls for uniform law," based on a rationale that bargaining parties would more willingly enter into contracts "for final arbitral or judicial resolution of disputes" if encouraged by a uniform system of laws assuring the prompt enforceability of their agreements. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-104, 82 S.Ct. 571, 576-577 (1962). However, as previously noted, the scope of jurisdiction granted by § 301 was intended to include only those disputes governed by the terms of the agreement itself. *Motor Coach Employees v. Lockridge, supra*, 403 U.S. at 300-301, 91 S.Ct. at 1925.

In addition, § 302(c)(5) of the LMRA enacted in 1947 [29 U.S.C.A. § 186(c)(5)] requires that any employer agreement to pay funds to a labor-management employee

benefit trust be *in writing*, as a means of fighting corruption in employer-union relations, and in order to assure that the employees working under the agreement will have a reliable basis for knowing the terms of their employment, including fringe benefits. *Walsh v. Schlecht*, 429 U.S. 401, 97 S.Ct. 679 (1977); *Waggoner v. Dallaire*, 649 F.2d 1362, 1366 (9th Cir. 1981). Interpreting § 8(f) as permitting an agreement which can be repudiated or modified unilaterally by either party, or which can be treated as entirely voluntary or a nullity, would contravene the policies of § 302(c)(5).

Thus, when § 8(f) was enacted in 1959, § 301 and § 302(c)(5) already contained important protections of the enforceability, security and reliability of agreements concerning employer payments to employee benefit trusts. In the absence of clear legislative history to the contrary, § 8(f) should be interpreted in a manner consistent with the fundamental policies of those statutes.

C. Recent Enactment of § 515 of ERISA Reinforces the Principles That § 301 Jurisdiction Encompasses Only Those Disputes Governed by the Terms of the Contract Itself, and That the Contract Should Be Enforced According to Its Terms.

Section 515 of ERISA was enacted by amendment in 1980 to "simplify delinquency collection" by trustees of employee benefit plans, based on a perception by Congress that "simple collection actions brought by plan trustees ha[d] been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plan's entitlement to the contributions." *Kaiser Steel Corp. v. Mullins, supra*, 102 S.Ct. at 861 (1982). Section 515 is properly to be considered in this case because "a court is to apply the law in effect at the time it renders its decision" and McNeff cannot show

that doing so would result in manifest injustice or that statutory direction or legislative history requires the contrary. *Bradley v. Richmond School Board*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016 (1974).

The express language of § 515 (App., *infra*, p. 3) requires an employer to pay contributions according to the terms of the agreement ". . . to the extent not inconsistent with law . . . ." An agreement permitted by § 8(f) is certainly "not inconsistent with law," and neither would judicial enforcement of such an agreement ". . . be enforcing . . . precise conduct made unlawful . . . ." *Cf., Kaiser Steel Corp. v. Mullins, supra*, 102 S.Ct. at 857. Thus, § 515 expresses a clear requirement that an employer party to an agreement such as the Agreement between McNeff and Local 12 "shall pay" contributions according to the terms of the agreement.[16]

This Court has had previous opportunitites to consider the reconciliation process involved in reaching an accommodation between the policies of older statutes and a more recently enacted statute.

> "Statutory interpretation requires more than concentration upon isolated words; rather, *consideration must be given to the corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions*.
>
> * * *
>
> "Thus it [is] the task of the courts to accommodate, to reconcile the older statutes with the more recent

---

[16] A comprehensive presentation and analysis of the legislative history of § 515 of ERISA, its purpose and intent, is presented in the Brief of *Amicus Curiae* filed in this case on behalf of the National Coordinating Committee for Multiemployer Plans (*Am. Cur.* Br., Argument, Parts A and B. To avoid redundancy in the recitation of legislative events underlying the interpretation of § 515 presented here, the Court is respectfully referred to that *amicus* brief for a fuller explication of § 515 within the views of respondent Trustees.

ones." (Emphasis added.) *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 250-251, 90 S.Ct. 1583, 1592-1593 (1970).

See, also,

Brotherhood of Railroad Trainmen v. Chicago River & Ind. R. Co., 353 U.S. 30, 77 S.Ct. 635 (1957).

Reconciliation of § 8(f) with the earlier enacted provisions of § 301 and § 302(c)(5) and the later enacted § 515 of ERISA is much less problematical than the circumstances faced in *Boys Markets* and *Chicago River*, because neither the language of the statutes nor their underlying policies are "ostensibly inconsistent." The reversal of both cases [*Washington Area Carpenters Welfare Fund v. Overhead Door Co.*, 488 F.Supp. 816 (D.C. 1980), *reversed*, 681 F.2d 1 (D.C. Cir. 1982); *Western Washington Trust Fund v. McDowell*, 103 LRRM 2219 (W.D. Wash. 1979), *reversed*, No. 80-3024 (9th Cir. 1982 — *unpubl.*), *pet. cert. pend.*, No. 81-2209] expressly disapproved in the legislative history of § 515 *on grounds independent of the enactment of § 515* indicates that Congress was right in viewing those lower court decisions as "incorrectly decided" under the pre-existing law. 126 Cong.Rec. H7899 (daily ed. Aug. 26, 1980). Congress saw § 515 as "intended to clarify the law," *ibid.*, and, thus, as consistent with the pre-existing law.

Reading § 8(f) as permitting an employer to avoid a § 8(f) agreement only by filing a § 9 petition which results in a union loss of election: (1) is supported by the express language and legislative intent of § 8(f); (2) is consistent with the long held view that § 301 jurisdiction covers only "those disputes that are governed by the terms of the collective bargaining agreement itself," *supra*, p. 10; (3) is consistent with the requirement and policy of § 302(c)(5) that employer agreements to pay contributions to labor-management employee benefit trusts be in writing

and reliable; (4) would maintain the principles of the *Garmon* rule by preserving Board jurisdiction in employee representation disputes; and (5) is entirely consistent with the expressed motivations for enactment of § 515 of ERISA.

This clear consistency in the reading of all four statutes and the interconnecting policies which run through "the total corpus of pertinent law" is a compelling rationale for the judicial enforcement of agreements made pursuant to § 8(f).

CONCLUSION.

Based on the foregoing, the decision of the Court of Appeals affirming the judgment of the district court should be affirmed.

Dated: October, 1982.

Respectfully submitted,

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APPENDIX.

Statutes Involved.

The statutes involved in this case are:

A. § 8(f) of the National Labor Relations Act, 73 Stat. 545, 29 U.S.C.A. § 158(f):

> "(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection,

shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)."

B. § 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C.A. § 185(a):

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

C. § 302(c)(5) of the Labor Management Relations Act of 1947, 61 Stat. 157-158, 29 U.S.C.A. § 186(c)(5):

"(a) It shall be unlawful for any employer to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or

hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities."

D. § 515 of the Employee Retirement Income Security Act of 1974, as added by § 306(a) of the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1295, 29 U.S.C.A. § 1145:

"Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement."

Supreme Court, U.S.
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No. 81-2150

IN THE

Supreme Court of the United States

October Term, 1982

JIM MCNEFF, INC., a California corporation,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

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No. 81-2150

IN THE

Supreme Court of the United States

October Term, 1982

JIM MCNEFF, INC., a California corporation,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER.

1. *Respondents' Position Conflicts With Board Policies.* Respondents urge that the starting point for interpreting Section 8(f) is the language of the statute itself and that "absent a clearly expressed legislative intention to the contrary" such language is conclusive. Petitioner does not quarrel with this proposition,[1] but must point out what Respondents and all of their supporting amici curiae have ignored. Section 8(f) is an exception to the general rule, founded on *basic* employee rights, that prehire agreements are in and of themselves unlawful. It is a basic tenet of statutory construction that exceptions to general rules are to be narrowly construed. Accordingly, the Board and this Court have re-

[1]Using Respondents' argument, the Board formulated its policy by noting that the "language of the section, as enacted, clearly suggests the limits of its effect". *R. J. Smith*, 191 NLRB 693 at 694. The Board reasoned that Congress intended to allow inquiry into a union's status not only through an election but at any time during a Section 8(a)(5) proceeding and refused, retroactively and prospectively, to enforce the agreement.

peatedly construed the exceptions of Section 8(f) narrowly. This Court in *NLRB v. Local Union No. 103, Iron Workers (Higdon Contracting Co.)*, 434 U.S. 335 at 345 specifically held that the exception is of limited scope.[2]

The Board and this Court have noted two reasons for Congressional enactment of Section 8(f): (1) prehire agreements help the employer know his labor costs before preparing bids for construction contracts; and (2) prehire agreements allow the union to provide a supply of skilled craftsmen ready for quick referral. *Higdon*, 434 U.S. at 348; *R. J. Smith Construction Co.*, 191 NLRB 693 at 694.

The Board's position, adopted by this Court in *Higdon*, that minority prehire agreements are not enforceable confines the exception of Section 8(f) to the purposes of its enactment. Respondent and its supporting amici curiae seek to expand the exception by creating additional "purposes" for its enactment and by interpreting the exception broadly. The Board's position was ably summarized in its brief in *Higdon*.

> In summary, these principles may be distilled from the Board decisions above: Where a union with a prehire agreement does not in fact represent a majority of the employees, the employer is not required to comply with the agreement and the union is not permitted to force such compliance by prolonged recognitional picketing. If the union does in fact represent a majority, the employer is required to honor the agreement and the union does not violate Section 8(b)(7) by picketing to force compliance.

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[2]In *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 at 631 n.10 (1975), this Court reviewed a case urged by a party as support for its position and noted that the "agreement in question may have been a prehire agreement under Section 8(f), and it is not clear that the contractor argued that it was invalid for lack of a collective bargaining relationship."

> While the foregoing principles do not give conclusive effect to pre-hire agreements, they by no means render pre-hire agreements "an exercise in futility" or "virtually unenforceable"; rather, they provide reasonable assurance that such agreements will have the effect and serve the purposes which Congress intended in sanctioning them. Employers and unions in the construction industry are able to enter into pre-hire agreements that will provide the employer with the needed certainty in determining his costs and with a ready supply of skilled labor. Where, as Congress assumed would generally be the case, the union does represent a majority of the employees later hired, the union can enforce adherence to the pre-hire contract, through unfair labor practice proceedings or picketing, just as a union signatory to a standard collective agreement could do. Brief for Petitioner, pp. 27-28, *Higdon*, 434 U.S. 335 (1978).

The Board was correct. These principles do serve the purposes which Congress intended. It is very important to note that neither Respondents nor any of their supporting amici curiae have cited a single case in which an employer obtained union members from the union pursuant to a prehire agreement and then avoided the contract's obligations. The Board enforces such contracts on a jobsite by jobsite basis because the union obtains its majority on those jobsites. *Dee Cee Floor Covering*, 232 NLRB 421 (1977).[3] Respondent and their supporting amici curiae, however, adopt cases and policies which enforce minority prehire agreements where the employers receive none of the benefits envisioned by Congress.

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[3]And, if the union achieves a majority in a permanent and stable unit of employees, the Board drops its jobsite by jobsite approach and enforces the agreement for its entire duration. *Land Equipment Incorporated*, 248 NLRB 685 (1980).

Respondents acknowledge the two reasons stated for Congressional enactment of Section 8(f). Yet Respondents add a third element of legislative history: Congress wished to enable construction unions "to stabilize employment conditions in a geographic area over a period of years." Brief for Respondents, pp. 14, 16. Respondents do not cite any legislative history to support this supposed Congressional intent. This analysis of Congressional intent is also missing from all of the amici curiae briefs.

Respondents ultimately contend that legislative history reveals that minority prehire agreements are enforceable until the Board certifies that the union has lost a representation election. Yet this is the exact position taken by the District of Columbia Circuit in reversing the Board in *R. J. Smith* and *Higdon*. It is precisely this analysis which the Board attacked in its petition and briefs to this Court in *Higdon*.

Nevertheless, Respondents contend that the Board supports their interpretation of Section 8(f). Initially, Respondents note that the Board has refused to find a violation of Section 8(b)(7)(C) where a union picketed to obtain "alleged past obligations" under a prehire agreement when the union did not seek current recognition. *International Union of Operating Engineers, Local 150 (Tri-City Excavating, Inc.)*, 255 NLRB No. 83 (1981). To begin with, the Board did not find the agreement to be enforceable in Section 8(a)(5) proceedings. Its position to the contrary has been consistent. *R. J. Smith Construction Co.*, 191 NLRB 693 (1971); *Ruttmann Construction*, 191 NLRB 701 (1971); *Corrugated Structures, Inc.*, 252 NLRB 523 (1980); *Land Equipment Incorporated*, 248 NLRB 685 at 686, n.4 (1980). Indeed, the Board continually labeled the union's claim as an "alleged" past obligation.

The Board noted that the Act's election provisions could not solve the underlying dispute in the case. Section 8(b)(7)(C) has specific provisions calling for expedited elec-

tions to solve recognitional issues during the urgency of picketing. The entire mechanism of the section revolves around the filing, and the timing of such filing, of an election petition. The whole purpose of the section is to solve an immediate problem, not a past problem. Section 8(a)(5), however, by its nature, always looks to past conduct. In *R. J. Smith*, the Board went to great lengths to emphasize that majority status can be raised *at any time* in Section 8(a)(5) proceedings to negate the enforcement of minority prehire agreements.

The coverage of Sections 8(b)(7)(C) and 8(a)(5) are not coextensive. In its brief in *Higdon*, the Board emphasized to this Court that the sanctions of Section 8(b)(7)(C) do not prohibit all recognitional picketing. If a petition is timely filed, the union can picket beyond thirty days, and, even without a petition, the union can usually picket thirty days without violating Section 8(b)(7)(C). But this does not mean that minority prehire agreements are enforceable for thirty days or for any other period coextensive with Section 8(b)(7)(C) functions. Furthermore, Section 8(f) issues arise in 8(b)(7)(C) cases to determine only if an affirmative defense can be raised that picketing is not for initial recognition. In *Higdon*, the Board held that to allow the affirmative defense in an 8(f) context would permit a union to obtain through the "back door" what it could not obtain through the front door. But the entire affirmative defense is not relevant if a union is not seeking current recognition.[4] The fact that the "back door" is structurally inoperative does not mean that the front door should be closed accordingly.

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[4]Since the affirmative defense is not relevant, it makes no difference whether the "alleged" past obligation arose under a prior minority agreement or under a prior majority status collective bargaining agreement. The case simply has nothing to do with the minority status of a labor organization.

Respondent also contends that the Board's case in *Giordano Construction Co.*, 256 NLRB No. 10 (1981), stands for the proposition that the Board supports judicial enforcement of minority prehire agreements until certification of a union's loss of majority status. Brief for Respondents, pp. 24-25. Respondents assume that the employer simply wished to test the views of employees and did not contend that the contract was "automatically avoided by its breach, or by repudiation". But *Giordano* was a representation case and these issues are simply not relevant to representation issues.

Respondents contend that *Giordano* demonstrates a construction union's difficulty in establishing majority status and a contract bar. Yet the union was quite able to develop a full record establishing the union's majority status on a series of individual jobsites. If the employer had not complied with the agreement on any of these prior jobsites, it would be subject to remedial action pursuant to Section 8(a)(5) or Section 301 litigation. Furthermore, if the union had shown its majority to be in a permanent and stable unit, the employer would not be free to "automatically avoid" the agreement. Respondents' further contention that the Board did not treat the agreement as a nullity, merely that the agreement would not bar an election, confuses the purposes of representation hearings with unfair labor practice proceedings. In Section 8(a)(5) proceedings, the Board has consistently refused to enforce, retrospectively, minority prehire agreements. *Corrugated Structures, Inc.*, 252 NLRB 523 (1980); *D'Angelo & Kahn, Inc.*, 248 NLRB 396 (1980); *G. M. Masonry Co.*, 245 NLRB 267 (1979); *Dee Cee Floor Covering*, 232 NLRB 421 (1977); *Ruttmann Construction*, 191 NLRB 701 (1971); *R. J. Smith Construction Co.*, 191 NLRB 693 (1971). Similarly, in Section 8(a)(5) cases, the Board has routinely enforced such agreements upon a showing that the union enjoyed majority status. *Hageman Underground Construction*, 253 NLRB 60 (1980); *Quad*

C. Corp., 246 NLRB 463 (1979); *Amado Electric, Inc.*, 238 NLRB 37 (1978); *Authorized Air Conditioning Co.*, 236 NLRB 131 (1978); *Haberman Construction Company*, 236 NLRB 79 (1978); *Davis Industries, Inc.*, 232 NLRB 946 (1977).

2. *Litigation of Majority Status.* Respondent's arguments are based on a rather glaring misunderstanding of Board procedures and the differences between representation and unfair labor practice proceedings. Respondents contend that the courts should not determine majority status because "courts have no access to a secret ballot election process". Brief for Respondents, p. 30. But the General Counsel has no availability to the Board's election procedures in a Section 8(a)(5) proceeding. All of the cases in which the Board has enforced the terms of prehire agreements based on majority status have been on proof of union support without an election. Respondents state:

> When the General Counsel of the NLRB rules that the union has failed to provide sufficient proof of prior attainment of majority status, the ultimate result is an election to decide the issue. Brief for Respondents, p. 31.

Nothing can be further from the truth. The General Counsel does not "rule" on majority status. The General Counsel, as the agency's prosecutor, alleges that a union has majority status *in an unfair labor practice proceeding* and an administrative law judge or the Board rules on his proof, not on election results. Furthermore, the General Counsel, by statute, plays no role in representation proceedings.[5] The

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[5]Under Section 3(d) of the Act [29 U.S.C. Section 153(d)] the General Counsel is responsible for matters under Section 10 of the Act [29 U.S.C. Section 160] involving the prevention of unfair labor practices.

Under Section 3(b) of the Act [29 U.S.C. Section 153(b)] the Board is responsible for matters under Section 9 of the Act [29 U.S.C. Section 159] involving representation proceedings.

General Counsel simply has no authority to direct an election in a Section 8(a)(5) proceeding or any other proceeding.

Respondents and the Carpenters Trust Funds[6] argue that litigation of majority status would involve representation issues which are best left to the Board's expertise. Representation issues, as well as unfair labor practice issues are often left for the Board's exclusive domain.[7] But this Court has held that courts, under Section 301, and the Board have concurrent jurisdiction when unfair labor practices also constitute breaches of a collective bargaining agreement. *Smith v. Evening News Ass'n.*, 371 U.S. 195 (1962). Where the very enforceability of an agreement necessitates an examination of majority status issues, there is no reason to erode the concurrent jurisdiction of the Board and courts. The Board supported this approach in its reply brief in *Higdon* when it urged that prehire agreements were enforceable in Section 301 litigation if the union demonstrates majority status, the argument adopted by this Court.

Furthermore, the argument by the Carpenters Trust Funds makes no sense. Unlike Respondents, they support the notice of repudiation rule adopted by the court below. Yet, as noted by the court below, majority status issues will still have to be litigated before a court to determine if a notice of repudiation is proper.

An example of a union's ability to establish majority status in litigation is the case of *Land Equipment Incorporated*, 248 NLRB 685 (1980), a case in which Respondents herein participated. Operating Engineers Local 12 filed a Section 8(a)(5) charge alleging that two companies, as a single employer, violated the Act by refusing to comply

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[6]The amici curiae Carpenters Trust Funds for Southern California, the Construction Laborers Trust Funds for Southern California and the Cement Masons Trust Funds for Southern California are herein referred to collectively as Carpenters Trust Funds.

[7]Indeed, if an election petition is filed it would be best for a court to defer to the election process.

with a prehire agreement. The Trustees of the Local 12 Trust Funds, Respondents herein, intervened and participated in the Board proceedings. The administrative law judge rejected an argument urged by Respondents that the mployer must "void" a "voidable" agreement before it can raise the defense of a lack of majority status — the position taken by the court below:

> General Counsel and the Trusts argue that Section 8(f) merely makes a contract voidable and that Respondent did not void the contract since it continued to utilize the hiring hall and to adhere to the contract as to "Land employees." The Board has rejected a similar argument in *Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (Higdon Contracting Company)*, 216 NLRB 45 (1975). Thus, it is necessary to inquire into the Union's majority status. *Id.* at 689.

The judge then found that the union represented a majority in what was a permanent and stable complement of employees and ordered the employer to adhere to the agreement, including payments to the trust funds, "retroactively and prospectively." *Id.* at 690. Since the employer had concealed its noncompliance from the majority representative, the Board's statute of limitations did not bar the judge from ordering retroactive compliance beyond the statute of limitations. *Id.* at 690, n.10. On review, the Board agreed with the judge's findings. *Id.* at 685, n.2 and n.4. However, the Board limited retroactive compliance to the date the union achieved majority status. *Id.* at 686 n.4.

The *Land Equipment* case, and the many other Board cases finding majority status in prehire cases, negates the unsubstantiated cry of Respondents and their supporting amici curiae that Petitioner's position will make it impossible for unions or trust funds to establish majority status on either a jobsite by jobsite basis, or, as in *Land Equipment*, in a stable and permanent complement of employees. The

Board routinely admits as evidence union membership to establish majority support in these cases. Although such evidence is not conclusive, the employer's burden of overcoming the presumption has rarely, if ever, been met.

3. *Conflicting Policies of the Board and the Court Below*. Although Respondents attempt to reconcile their position with Board policy, they eventually, as do all of their supporting *amici curiae*, rely on the principle that different policies should apply in 301 litigation versus unfair labor practice litigation. The problem this creates is illustrated by *Land Equipment*.

In *Land Equipment*, the Board adhered to its policy first formulated in *R. J. Smith* that it would not retroactively enforce prehire agreements to a point in time when the union did not have majority status despite specific findings in both cases of active concealment by the employers of their noncompliance. Yet the court below used such conduct as the very foundation of its holding:

> It is precisely this sort of action by an employer, enjoying the benefits of a prehire agreement and *misleading the union as to the employer's intention of never performing its obligation*, which has led us to adopt this view of the voidability of these contracts. (Emphasis added.) *Petition for Writ of Certiorari*, Appendix A, p. 8.

Initially, it is suspect for the court below to make such a finding based on an issue which was not addressed by any party in the motions for summary judgment. It is even more suspect to use such a finding on a non-issue to base a broad policy to rule in all cases even when no "concealment" is found. The court below has summarily reversed district court decisions which were based on Board policy even though no "concealment" was found. *Trust Fund v. McDowell*, 103 LRRM 2219 (W.D. Wash. 1979), *rvs'd*, No. 80-3024 (9th Cir. March 2, 1982), petition for cert. filed (U.S. May 28, 1981) (No. 81-2209); *Paddock v. Clark*,

107 LRRM 2325 (D. Ore. 1980), *rvs'd*, No. 80-3380 (9th Cir. March 2, 1982), petition for cert. filed (U.S. April 19, 1982).

In *Land Equipment* the Board also adhered to its policy enunciated in *Higdon*, that it would not require an "active" repudiation, or notice of such, before it determines the enforceability of a prehire agreement based on majority status. The policy of the court below is clearly in conflict.

Land Equipment highlights the problem this Court sought to cure in *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974). In *Land Equipment*, Respondents herein utilized the Board's procedures to obtain relief retroactive to a point in time when the union first obtained majority status. If Respondents' position before this Court is upheld, Respondents will be able to take that same claim to another forum to obtain relief prior to such point in time based, not on a different interpretation of the facts, but, upon policies specifically rejected by the prior forum.

4. *Respondents' Position Conflicts With Established Authority*. In *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), this Court held that the substantive law to be applied in Section 301 must be fashioned from the *policy* of our national labor laws.

Following *Lincoln Mills*, this Court encouraged the increase of forums to determine labor contract disputes, but has made every effort to ensure that a uniform labor policy be maintained. In *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), this Court, in permitting state courts to resolve such issues, specifically noted that the "basic purpose of Section 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations." *Id.* at 508. This Court noted that "diversities and conflicts" may occur because of this, but noted that one of the "traditional functions of this Court" was to resolve such diversities. One month later, in *Local*

174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962), this Court ruled that state courts must apply federal labor law in exercising their concurrent jurisdiction with federal courts. This Court stated that the subject matter of Section 301(a) "is peculiarly one that calls for uniform law" noting that "the existence of possibly conflicting legal *concepts*" and "the possibility of conflicting substantive interpretation under competing legal *systems*" would be disruptive to the entire field of labor relations. (Emphasis added) *Id.* at 104.

This Court has taken the same approach in making the Board's proceedings compatible with the role of the courts under Section 301. In *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962) this Court adhered to its position of expanding forums to decide labor contract disputes. Where the breach of a labor contract is also an unfair labor practice, this Court continued its refusal to apply the preemption doctrine first espoused in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1953):

> The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by §301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under §301. *Smith v. Evening News*, 371 U.S. at 197.

As *Smith v. Evening News* implies, there are areas where the two jurisdictions do not overlap, but where they do, this Court has demanded uniformity. In *Howard Johnson*, this Court held that "basic policies" controlling in unfair labor practice litigation may not be disregarded by the courts under Section 301. *Howard Johnson*, 417 U.S. at 256. Furthermore, this Court looks first to the Board to determine federal labor policy. In *Higdon*, this Court stated that the "function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor

Relations Board, subject to limited judicial review." *Higdon*, 434 U.S. at 350.

The case relied upon by Respondents and their supporting amici curiae to distinguish this line of cases is *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). In *Pittsburgh Plate Glass*, this Court determined that a unilateral midterm modification of a collective bargaining contract which affects not "active" employees but already retired employees, was not a violation of the National Labor Relations Act. The basic decision of this Court was that retired employees are not "employees" within the meaning of the National Labor Relations Act. This Court noted, however, that these retired employees may have a remedy under Section 301.

Yet no one is contending that individuals not covered by the Act may not have a remedy under Section 301. The plain fact is that construction employees *are* covered by the Act. Several sections of the Act, including Section 8(f), are devoted to their specific concerns.

The basic weakness of the oppositions' arguments is that they all seek to interpret statutory policy behind Section 8(f) of the National Labor Relations Act to support their positions under Section 301. But, the legislative history behind Section 8(f) now being analyzed is the same legislative history analyzed in *Higdon*. Most of the positions taken by Respondents and their supporting amici curiae are the same arguments advanced in opposition to the Board's interpretation of legislative history in *Higdon*. They simply contend that their once defeated arguments should apply because the forum is different. This is the very evil of conflicting legal "concepts" and "policies" and "competing legal systems" which this Court condemned in *Lucas Flour* and *Howard Johnson*.

The government's amicus curiae brief is most illuminative in this regard because of its series of specious arguments. The government urges that Board concerns under Section

8(a)(5) of the Act are different than "the concerns of a court applying federal contract law in a Section 301 suit." Brief for the United States, p. 18. But courts do not apply "contract law" in isolation. They apply federal *labor* law. The government speaks of "[t]his distinction between contractual obligations and statutory obligations"[8] as if this Court's decisions in *Lincoln Mills, Charles Dowd, Lucas Flour, Howard Johnson* or *Smith v. Evening News* never existed.

The conflict of the Board with the government's position is evident in the government's underlying argument:

> A Section 8(f) contract *both* serves as a preliminary step to the union's achieving status as bargaining representative, and also "sets the compensation for services rendered to the employer while the agreement remains in effect." *Washington Area Carpenters Welfare Fund v. Overhead Door Co.*, 681 F.2d 1, 9 (D.C. Cir. 1982). (Emphasis added.) *Brief for the United States*, p. 5.

From this, the government reasons that the set compensation is enforceable until a notice of repudiation is delivered.

The government's premise conflicts with the Board's consistent and repeated pronouncements that prehire agreements are "merely" a preliminary step and "only" a preliminary step. The Board has made this statement in numerous cases and it repeated it in its briefs to this Court in *Higdon*.[9] There is not one Board case which has ever said that a prehire agreement is "both" a preliminary step and also a set compensation for services pending majority status. Furthermore, the concept that a prehire agreement is "both" a preliminary step and an enforceable set compensation for services is an

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[8]Brief for the United States, p. 18.

[9]*Ruttmann Construction*, 191 NLRB 701 at 702 (1971); *Local Union No. 103 (Higdon Contracting Co.)*, 216 NLRB 45 at 46 (1975); Brief for Petitioner, p. 25, *Higdon*, 434 U.S. 335 (1978); Reply Brief for Petitioner, p. 7, *Higdon*, 434 U.S. 335 (1978).

internally inconsistent concept. The Board rationale contemplates additional events after the preliminary step in order to make the agreement enforceable. Finally, the government cites only the District of Columbia Circuit's decision in *Overhead Door* to support this position. But this is tantamount to citing the case in review as support for affirmance of the case in review. The court below and the District of Columbia Circuit are the only circuits to adopt what the court below labeled "the middle ground." Using a bootstrapping argument as the foundation for its presentation reveals the weakness of the government's position.[10]

5. *The 1980 ERISA Amendments*. The National Coordinating Committee for Multiemployer Plans ("NCCMP") contends that the 1980 amendments to ERISA require that Petitioner cannot raise the minority status of a union as a defense to a suit brought by trustees. Not one of the circuits has adopted this analysis.

The underlying analysis of NCCMP was rejected by this Court in *Kaiser Steel Corporation v. Julius Mullins*, ___ U.S. ___, 109 LRRM 2268 (1982) when it refused to imply a repeal of the labor laws "which may be raised as a defense to a provision in a collective bargaining agreement requiring an employer to contribute to a pension fund." In addition, the history of the legislation does not support NCCMP's position.

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[10]Unlike Respondents and the AFL-CIO, the government and the Carpenters Trusts adopt the notice of repudiation rule of the court below. The Loyola Law Review adopts alternate arguments and favorably notes *Eastern District Council v. Blake Construction Co.*, 457 F.Supp. 825 (E.D. Va. 1978) where the district court "borrowed" the sixty day notice of termination provisions set forth in Section 8(d) of the Act [29 U.S.C. Section 158(d)] and held that the terms of a minority prehire agreement terminate sixty days following notice of intent to terminate.

Yet "borrowing" some Board law and some Board policy only highlights the conflict with Board policies. In the Board's landmark *R. J. Smith* decision, the Board not only held that the employer did not violate Section 8(a)(5) of the Act, it also did not violate Section 8(d) of the Act. The Board policy that notice requirements are not to be imposed on employers in minority prehire cases is clear.

Section 306(a) of the amendments should not be viewed in isolation. Section 306(b) plays an integral part in the legislative history of its counterpart. Furthermore, it must be remembered that this provision was a minor issue in a very detailed and lengthy statute which had, as its primary purpose, the creation of an obligation on employers who withdraw from participation in multiemployer pension plans to continue making payments until they fund an aliquot share of the plan's unfunded liabilities.

The forerunner to 306(a) and (b) was the Senate version Section 308(a) and (b) which read, in substantial part:

> [a] Every employer who is obligated under the terms of a collectively bargained multiemployer plan (or under the terms of a collective bargaining agreement related to the plan) shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.
>
> [b] In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan the unpaid contributions, interest on the unpaid contributions, an additional amount equal to interest on the contributions as liquidated damages, a reasonable attorney's fee and costs of the action, to be paid by the defendant, as well as such other legal or equitable relief as the court deems appropriate. For purposes of this paragraph, interest on unpaid contributions is determined using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1954, as amended.

These provisions are substantially the versions finally adopted by Congress in Sections 306(a) and (b).

The Senate Committee on Labor and Human Resources, in April 1980, published a 253 page detailed account and analysis of the entire legislation. After discussing the leg-

islation's primary provisions in this document, the Committee turned to the "miscellaneous provisions." The analysis of the Committee concerning Section 308 was set out in total in NCCMP's brief (pp. 15-16) without benefit of titles. The analysis, in pertinent part, reads:

F. MISCELLANEOUS PROVISIONS

* * *

3. *Delinquent Contributions (Bill Section 308; proposed ERISA section 515)*

* * *

> The bill imposes a Federal statutory duty to contribute on employers that are *already* contractually obligated to make contributions to multiemployer plans. A plan sponsor that prevails in any action to collect delinquent contributions will be entitled to recover the delinquent contributions, court costs, attorney's fees, and double interest on the contributions owed. *The intent of this section is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies* (Emphasis added). The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, Senate Committee on Labor and Human Resources (Committee Print), pp. 43-44.

As the subtitle implies, this integrated analysis was applicable to the entire Section 308, not just 308(a). The first part of the section was intended to codify what were "already" contractual obligations. The second part was to provide the teeth to the section by providing for substantial penalties. It is important to note that the provision was very detailed, as was the majority of the legislation. The Senate had no trouble in setting forth its intentions in detailed terms.

The Committee's print was published nine years after the Board, in *R. J. Smith*, determined that minority prehire agreements are not enforceable; two years after this Court in *Higdon* stated that "the union's majority standing is sub-

ject to litigation in a Section 301 suit to enforce a Section 8(f) contract just as it is in a Section 8(a)(5) unfair labor practice proceeding"; and after post- *Higdon* decisions held that minority prehire agreements are not enforceable. *Trust Fund v. McDowell*, 103 LRRM 2219 (1979). Despite various cross-references to other statutes in the legislation, including a cross-reference to the Internal Revenue Code in Section 308(b), there is no mention of a repeal or modification of Section 8(f) either in the legislation or its analysis. Furthermore, there is no language that suggests that minority prehire agreements are to be enforced.

Despite this, NCCMP notes various floor remarks by ex-Senator Williams and ex-Congressman Thompson and contends that their remarks be given substantial weight, citing this Court's decision in *North Haven Board of Education v. Bell*, ___U.S. ___ , 50 L.W. 4501 (May 17, 1982). In *New Haven*, this Court noted that statements of legislators made during debate are not necessarily controlling. However, the legislator involved in *New Haven* was a "sponsor of the language ultimately enacted" and his remarks were to be given greater weight in the circumstances of the case. This Court noted that the legislation to be interpreted involved floor amendments, that no committee reports were available to discuss the provisions, and the legislator's remarks were, therefore, the "only authoritative indications of congressional intent." 50 L.W. at 4504.

But a detailed analysis of the legislation in this case *is* available and it does not support the position of NCCMP. Furthermore, Thompson was not the "sponsor of the language ultimately enacted." The House did not even have a counterpart to the Senate's Section 308(a).[11] Also, his statement that pension plans should recover in suits "without regard to issues which might arise under labor-

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[11]NCCMP points to legislative history of Section 306(a), almost in isolation to 306(b), to support its position.

management relations law — other than 29 U.S.C. Section 186" has already been rejected by this Court in *Kaiser*. If the Senate Committee on Labor and Human Resources had intended to limit defenses to 29 U.S.C. Section 186, it could have easily drafted the legislation to specifically say so, or at least it would have declared its intent in its printed analysis. Finally, Williams and Thompson did not discuss Section 8(f) of the Act, minority prehire agreements, or even the construction industry in their remarks quoted by NCCMP. The statements are general statements regarding the purpose of the provisions to aid trust funds in the collection of delinquencies. NCCMP amplified on their remarks by describing one of the quoted cases, the district court decision in *Overhead Door*. But this description was not contained in the legislators' remarks which do not, in themselves, reflect any intent to modify Section 8(f) or this Court's *Higdon* decision. More importantly, the generalized statements would not *communicate* such intent to the other legislators. Furthermore, the quoted remarks cite approval of this Court's decision in *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960) as opposed to the district court decision in *Overhead Door*. But *Lewis v. Benedict Coal* is not inconsistent with the district court's decision in *Overhead Door*. (See this Court's discussion of *Lewis v. Benedict Coal* in *Kaiser*, 109 LRRM at 2272.) It is not clear what the legislators intended by their remarks and it is certainly not clear that the intent urged by NCCMP was communicated to the other legislators.

It should not be forgotten that the position taken by NCCMP contemplates rather substantial ramifications. This Court was correct in rejecting such consequences in *Kaiser* based on "scraps of legislative history."[12] The NCCMP would have one believe that these substantial effects were born in a "miscellaneous provision" within complex liti-

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[12]*Kaiser*, 109 LRRM at 2275, n.13.

gation when such consequences were never communicated to the members of Congress. In this regard, the argument presented by NCCMP that it could not find "any statement in the legislative record" contradicting Williams' and Thompson's statements, actually defeats its ultimate argument. If Congress had intended to modify Section 8(f) or to enforce minority prehire agreements, it would have created substantial comment and testimony on the subject. This simply did not occur.

The ultimate weakness of NCCMP's argument lies in its attempt to make its analysis compatible with *Kaiser*, in which this Court rejected appeals by implication and held that Section 306(a) codified existing case law. NCCMP repeatedly states that Congress intended to clarify existing law and denies that any implicit repeal or modification of Section 8(f) is involved.

If the NCCMP is correct that the law adds nothing new, the initial inquiry is, why is it raising the issue? Its attempt to adapt its argument to *Kaiser* is a non sequitur. It guts the heart of the dissenting opinion in *Kaiser* that labeled as "clearly erroneous" the majority's opinion that, "§306(a) [is] merely declaratory of pre-existing case law." *Kaiser*, 109 LRRM at 2276. To appeal to the majority, the NCCMP forfeited its foundation.

For these reasons, as well as those set forth in Petitioner's opening brief, the case should be remanded to the court below to make findings of fact and conclusions of law as to whether the Union had achieved majority status and whether the prehire agreement was voluntarily executed.

Respectfully submitted,

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No. 81-2150

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

JIM MCNEFF, INC.,
Petitioner,
v.
FRANK L. TODD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND FOR THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND FOR THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

This brief *amici curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amici curiae* in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

Jim McNeff, Inc., (hereafter the "petitioner" or "employer") entered into a prehire agreement with the International Union of Operating Engineers, Local No. 12 (hereafter the "union") pursuant to § 8(f) of the National Labor Relations Act, as amended. As part of that agreement, petitioner promised to make fringe benefit contributions to union-employer administered trust funds

established pursuant to § 302(c) of the Labor Management Relations Act. Although work was thereafter performed pursuant to the agreement, petitioner never made any of the fringe benefits contributions. After an audit, trustees of the funds, respondents here, brought suit pursuant to § 3C1 of the LMRA to collect the unpaid contributions. While petitioner signed the agreement, "he claims he has never read it, nor did he ever intend to abide by its terms." (667 F.2d 800, 801.) Petitioner has thus sought, and obtained, the benefit of labor, while dishonoring the obligation he undertook to pay for that labor in part by making contributions to the fringe benefit funds. Indeed, petitioner admittedly treated the § 8(f) agreement he signed as a legal nullity. The question in this case is whether petitioner and other employers in the same position, as well as the unions with whom they have contracted, may so treat § 8(f) agreements.

Petitioner's principal theory is that the § 8(f) agreement here is not judicially enforceable because the union has not established its majority representative status. We show that this defense is inconsistent with the language of § 8(f), which expressly makes such agreements lawful even if the union represents only a minority of the employees. Acceptance of the defense would, moreover, undermine a principal Congressional objective in enacting § 8(f)—to enable employers to know their labor costs before estimating their bids on construction projects. If, as petitioner would have it, a § 8(f) agreement has no binding effect, the agreement, which could be repudiated at any time by either party, would provide no assurance on future costs. And, of course, it would be unconscionable to permit an employer who enters into a § 8(f) agreement to accept labor and then repudiate any part of his obligation to pay for that labor. Additionally, § 301 of the LMRA, which was enacted to make agreements between employers and unions binding on both parties, is irreconcilable with such a defense.

Nor does petitioner's position receive any sustenance from *NLRB v. Iron Workers*, 434 U.S. 335. *Iron Workers* involved the relationship between § 8(f) and the provisions of the NLRA—§§ 8(a)(5), 8(b)(3), 8(b)(7)(C) & 9—that state the methods by which a union may become a majority representative and the bargaining obligation of employers and such representatives. *Iron Workers* approves the view of the NLRB that a prehire agreement is "voidable" until the union has attained majority status. The Court was not, however, called upon to determine by what means an agreement can be voided in the sense of vitiating the mutual obligations of the parties. The correct interpretation of the Act in our view is that a prehire agreement is binding until it has been terminated by the union's loss of the election authorized in the proviso to § 8(f). The alternative view which would allow a party to abrogate the prehire agreement merely by so notifying the other party has no basis in the statutory language, and is contrary to the purposes of both § 8(f) & § 301. Of course, while resolution of this question is of importance in the administration of the Act and to the rights of employers, employees and unions generally, the present case must go against petitioner in any event: For petitioner gave no notice to the union that petitioner was abrogating the contract, but simply failed to make the payments to which petitioner had obligated itself.

Petitioner resists enforcement of the § 8(f) agreement here also on the ground that he entered into the agreement under "duress". But that agreement was entered into under conditions envisioned and privileged by Congress, as is confirmed by this Court's decision in *Woelke & Romero, Inc. v. NLRB*, —— U.S. ——, 50 LW 4538 (May 24, 1982).

ARGUMENT

PETITIONER'S DEFENSES TO THIS ACTION TO SECURE COURT ENFORCEMENT OF A § 8(f) AGREEMENT CONFLICT WITH THE LANGUAGE AND POLICY OF THE NLRA AND LMRA.

A. The language of § 8(f) provides in pertinent part as follows:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members * * * because (1) the majority status of such labor organizations has not been established under the provisions of section 9 of this Act prior to the making of such agreement * * * Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

At its very outset the section thus provides that it "shall not be an unfair labor practice under subsections (a) and (b) of" § 8 to enter into an agreement described in § 8(f). But for this savings provision, an exclusive recognition agreement with a minority union in the construction industry would be "an unfair labor practice under subsections (a) and (b) of" § 8.[1] The execution of such an agreement "is legitimated by § 8(f) when the employer is in the construction industry." *NLRB v. Iron*

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[1] This was the holding of *Garment Workers v. Labor Board*, 366 U.S. 731. Although *Garment Workers* was not decided by this Court until 1961, the enactment of § 8(f) was urged upon Congress by employers and unions in the construction industry because of their concern, prompted by prior Board decisions, that §§ 8(a) & (b) would be so interpreted.

Workers, 434 U.S. 335, 345 (hereafter "*Iron Workers*" or *Higdon*").[2] A judicial order requiring an employer to observe the obligations stated in a § 8(f) agreement is therefore an order requiring observance of an agreement Congress took pains to make lawful.[3]

Moreover, an employer's effort to escape its obligations under a § 8(f) agreement wholly undermines a principal purpose served by prehire agreements in the construction industry, a purpose of which Congress approved and which was a motivating reason for § 8(f)'s enactment:

> One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. [S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959), quoted in *Iron Workers*, 434 U.S. at 348.]

If a § 8(f) agreement is not legally enforceable an employer cannot know in advance of bidding what his labor costs will be. To be sure, if petitioner succeeds in this particular case, the only immediate effect would be that a § 8(f) agreement would put a *ceiling* on the employers' obligations, but neither petitioner nor his supporting *amici curiae* has had the temerity to suggest that § 8(f) allows employer parties to nullify agreements but prohibits union parties from doing so. Thus, in a period of full employment a union could, on petitioners' view that a § 8(f) agreement is not binding, strike, or refuse to refer employees as previously agreed upon unless the em-

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[2] The remainder of the quoted passage from *Iron Workers* in which the Court defined the "limited scope" of § 8(f)'s exception is also material in this case and is quoted at p. 8, *infra*.

[3] We note, in passing, that the particular obligation sought to be enforced here—the making of payments to funds which comply with § 302(c)(5) of the LMRA—is also entirely lawful. Contrast *Kaiser Steel Corp. v. Mullins*, —— U.S. ——, 50 L.W. 4152 (Jan. 13, 1982) which allowed the defense of illegality in an action seeking the payment of fringe benefits.

ployer promised to pay higher wages (or make larger fringe benefit contributions) than previously agreed upon.

Allowance of petitioner's defense in this case likewise is inconsistent with the plain words of § 301, the jurisdictional provision on which this suit was brought.[4] That section, without any limitation even arguably pertinent here, provides federal court jurisdiction over "[s]uits for violations of contracts between an employer and a labor organization * * *." And petitioner's position utterly perverts § 301's objective:

> We feel that the aggrieved party should also have a right of action in the Federal courts. * * * If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. * * * Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce. [S. Rep. No. 105, 80th Cong., 1st Sess. 15-16 (1947) quoted in *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 453.]

As the *Textile Workers* Court stated, § 301 "expresses a federal policy that federal courts should enforce [the] agreements [within its scope] on behalf of or against labor organizations and that industrial peace can be best obtained only in that way" (353 U.S. at 455). Thus, § 301 particularizes the salient point of the law of con-

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[4] An additional basis for jurisdiction over the present case by the trustees is § 502(g) of the Employees' Retirement Income Security Act of 1974, 29 U.S.C. § 1132(g) which has since been amended by § 306 of the Multiemployer Pension Plan Amendments of 1980, 29 U.S.C. § 1145. Petitioner's defense to the action of the respondent trustees is inconsistent with that Act also. We do not address this point, because it is developed in the briefs for respondent and *amicus curiae* National Coordinating Committee for Multiemployer Plans.

tracts generally—that the parties to an agreement are to be held to the promises contained therein through court actions to enforce the agreement. And nothing in the legislative history of § 8(f) signals an intent to create something so extraordinary as an unenforceable agreement. While the 1959 Congress made it plain that "[n]othing in such provision [§ 8(f)] is intended . . . to authorize the use of force, coercion, strikes, or picketing to compel any person to enter into such prehire agreements" (H.R. Rep. No. 1147, 86th Cong., 1st Sess., 42 quoted and discussed in *Iron Workers*, 434 U.S. at 348, n.10) there is not a word suggesting that a § 8(f) agreement, once entered into, is not, like all other "contract[s] between an employer and a labor organization", enforceable in court through § 301. Against this background the rule stated in *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 is very much in point:

> Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms. See *Perrin v. United States*, 444 U.S. 37, 42-43.

B. Petitioner's claim that a § 8(f) agreement has no binding effect rests primarily on a misreading of *NLRB v. Iron Workers*, *supra*. According to petitioner, "This Court in *Higdon* held that minority prehire agreements are unenforceable" (Br. for Pet. p. 22, initial caps omitted). This Court did not so hold.

(1) What the *Iron Workers* Court did hold was that the National Labor Relations Board acted within its powers in determining that a union that is a party to a § 8(f) agreement, and that does represent a majority of the employees, violates § 8(b)(7)(C) by picketing to enforce that agreement (434 U.S. at 341-343, 350, 352). The Court ruled too—since the question was also at the heart of the disagreement between the Board and the Dis-

trict of Columbia Circuit over the meaning of § 8(f) (see *id.* at 341)—that the Board could properly conclude that an employer who is a party to a § 8(f) agreement violates his duty to bargain under § 8(a)(5) by refusing to honor such an agreement *only* if the union represents a majority of the employees (*id.* at 345-346). In reaching these results, the Court reasoned as follows:

After observing that § 8(f) is an exception to the rule making agreements which grant exclusive recognition to a minority union an unfair labor practice (see p. 5, *supra*), the Court continued:

> [This] exception is nevertheless of limited scope, for the usual rule protecting the union from inquiry into its majority status during the terms of a collective bargaining contract does not apply to prehire agreements. A proviso to the section declares that a § 8(f) contract, which would be invalid absent the section, "shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)." The employer and its employees—and the union itself for that matter—may call for a bargaining representative election at any time. [434 U.S. at 345.]

This proviso, as the Court observed, "expos[es] unions with prehire agreements to inquiry into their majority standing by elections under § 9(c) * * *" (*id.*). It was on the basis of the proviso that the Board held, with this Court's approval, that a § 8(f) agreement does not, by itself, grant the union the status of an exclusive bargaining representative—the status required to bring into play the employer duty to bargain stated in § 8(a)(5) (*id.* at 345-346).

In *Iron Workers* itself the Board had extended this reasoning to the § 8(b)(7)(C) context, holding

> that when the union picketed to enforce its prehire agreement, [the employer] could challenge the union's majority standing by filing a § 8(b)(7) charge and could prevail, as Higdon did here, because the

> union admittedly lacked majority credentials at the picketed projects. Absent these qualifications, the collective-bargaining relationship and the union's entitlement to act as the exclusive bargaining agent had never matured. Picketing to enforce the § 8(f) contract was the legal equivalent of picketing to require recognition as the exclusive agent, and § 8(b)(7)(C) was infringed when the union failed to request an election within 30 days. [434 U.S. at 346.]

This Court concluded that the Board's view is not inconsistent with the language or purpose of the statute:

> Because of § 8(f), the making of prehire agreements with minority unions is not an unfair practice as it would be in other industries. But § 8(f) itself does not purport to authorize picketing to enforce prehire agreements where the union has not achieved majority support. Neither does it expand the duty of an employer under § 8(a)(5), which is to bargain with a *majority* representative, to require the employer to bargain with a union with which he has executed a prehire agreeemnt but which has failed to win majority support in the covered unit. [434 U.S. at 346, emphasis in original.]

Moreover, the *Iron Workers* Court declared that the major purpose of § 8(b)(7) is to prevent the use of picketing to interfere with the employees' free choice of an exclusive bargaining representative (*id.* at 346-347) and that "Congressional concern about coerced designations of bargaining agents did not evaporate as the focus turned to the construction industry" and to the enactment of § 8(f) (*id.* at 347-349).

(2) The foregoing holdings that a minority union may not enforce a § 8(f) agreement either by a refusal to bargain charge under § 8(a)(5) or by picketing, do nothing to support petitioner's much broader contention that a minority union may not enforce such an agreement at all, specifically in a suit under § 301, as here.

Petitioner's premise is that a determination that an employer who does not abide by a § 8(f) agreement with a minority union does not commit a § 8(a)(5) unfair labor practice requires the conclusion that the employer has not violated the contract for the purposes of § 301 (see Pet. Br. 43-47). That is a false premise. While the 1947 Congress had originally intended to grant the NLRB a jurisdiction over contract breaches *equal* to that of the courts, that approach was rejected in favor of one that, through §§ 8(a)(5), 8(b)(3) & 8(d), grants the Board a *narrower* jurisdiction in this regard than § 301 grants the courts. As a result, for example, the Court has "[held] that * * * a 'modification' [of a contract provision] is a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining" and that the "remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract * * *". (*Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157, 185, 188.) As there explained:

> [Section 8(d)] stems from the 1947 revision of the Act, an important theme of which was to stabilize collective-bargaining agreements. The Senate bill, in particular, contained provisions in §§ 8(d) and 301(a) to prohibit unilateral mid-term modifications and terminations and to confer federal jurisdiction over suits for contract violations. See S. 1126, 80th Cong., 1st Sess., §§ 8(d), 301(a). The bill also included provisions to make it an unfair labor practice for an employer or labor organization "to violate the terms of a collective-bargaining agreement." *Id.*, §§ 8(a)(6), 8(b)(5). In conference the Senate's proposed §§ 8(d) and 301(a) were adopted with relatively few changes. See H. R. Conf. Rep. No. 510, *supra*, at 34-35, 65-66. The provisions to make contract violations an unfair labor practice, on the other hand, were rejected with the explanation that "[o]nce parties have made a collective bargaining contract the enforcement of that contract should be

> left to the usual processes of the law and not to the National Labor Relations Board." *Id.*, at 42. The purpose of the proscription of unilateral mid-term modifications and terminations in § 8(d) cannot be, therefore, simply to assure adherence to contract terms. As far as unfair-labor-practice remedies are concerned, that goal was to be achieved through other unfair-labor-practice provisions that were rejected in favor of customary judicial procedures. See *Dowd Box Co. v. Courtney*, 368 U.S. 502, 510-513 (1962). [404 U.S. at 186-187.]

In the present context, the respect in which § 8(a)(5) is narrower than § 301 is apparent on the face of the two provisions. Section 8(a)(5), by reference to § 9(a), is expressly limited to making refusals to bargain with a union that has obtained majority status an unfair labor practice. Section 301 is not so limited; that provision extends to all suits for violation of "contracts between an employer and a labor organization" and not just to such suits based on a contract between an employer and a majority representative. In light of this difference the *Iron Workers'* holding that there is no § 8(a)(5) unfair labor practice in the present circumstance is of no greater moment in this § 301 case than the holding in *Pittsburgh Glass* that there had been no § 8(a)(5) violation would be in a § 301 case based on a breach of a contract provision covering a non-mandatory bargaining subject. For in both these instances, and in contrast to *Howard Johnson v. Hotel Employees*, 417 U.S. 249, on which petitioner relies, the refusal to provide relief is based on Congress' policy of limiting the unfair labor practice provisions so that certain breach-of-contract claims would be the exclusive province of the courts and not on a Congressional policy rendering agreements which the parties have made wholly unenforceable.

Further, "economic coercion" by picketing differs fundamentally from "coercion" by a court order under § 301. Indeed, it is the precise distinction between picketing and litigation on which this Court relied in declaring that

the Board's interpretation of § 8(b)(7) "does not, as respondents [Iron Workers] claim, render § 8(f) meaningless" (434 U.S. at 349). In an accompanying footnote (*id.* at n.11) the Court compared § 8(f) to the construction industry proviso to § 8(e), which permits enforcement of "hot-cargo clauses" by judicial action, but not "by conduct forbidden by § 8(b)(4)" (which includes, but is not limited to, picketing). Petitioner's position, which would exclude both picketing and judicial enforcement, *would* "render § 8(f) meaningless".

Distinguishing §§ 8(a)(5) & 8(b)(7) on the one hand and § 301 on the other is also in harmony with the proviso to § 8(f) whereby the "employer and its employees—and the union itself for that matter—may call for a bargaining representative election at any time" (434 U.S. at 345). Enforcement of a § 8(f) agreement through a refusal to bargain charge or by picketing where the union has not previously been chosen by a majority of the employees would enable the union to achieve the status of an exclusive bargaining representative while circumventing the election provided for in the § 8(f) proviso. But judicial enforcement of such an agreement does not create majority status; rather the court order merely gives effect to the terms of an entirely lawful § 8(f) agreement such as, for example, those stating the obligation to make payments to § 302(c) trust funds, as here, or the obligation to utilize a union hiring hall as expressly provided in § 8(f)(3).[5]

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[5] Pet. Br. 35 points to a case in which the employer had refused to use the union hiring hall. The union was subsequently decertified in an election. According to petitioner "the requirement for using the union hiring hall was obviously not in [the employees] best interests" (*id.*) This supposed detriment to the employees should be prevented, petitioner's argument runs, by refusing enforcement to the agreement. But if the employer in that case had complied with the agreement, he might have obtained a complement of employees who would have voted for rather than against the union; indeed, it is reasonable to surmise that the employer in that

(3) Petitioners criticize the lower courts which have enforced § 8(f) prehire agreements for misunderstanding the nature of collective bargaining agreements (Pet. Br. 22-23). Petitioner's basic notion is that labor contracts are "contracts between an employer and its employees, through the union as the *agent*—the collective bargaining agent—of the employees" (*id.*, emphasis in original). This betrays petitioner's total inattention to the language of § 301(a) which grants jurisdiction to the federal courts over "[s]uits for violation of *contracts between an employer and a labor organization* representing employees in an industry affecting commerce * * *" (emphasis added). Petitioner's assertion also ignores, as we have noted, § 8(f)'s primary purpose; for if unions are not parties to prehire contracts, then unions may, after having signed such agreements, repudiate them with impunity and strike for higher wages. Nor is petitioner's denial of the union's role as a party to the agreement a mere inadvertence; petitioner concludes this portion of its argument by stating that a union that enters into a § 8(f) agreement "is an agent waiting for a principal. Until [the union achieves majority support] the prehire agreement is a document waiting to be adopted by a majority of the employee." (Pet. Br. 23). In other words, until that time, there is, according to petitioner, no binding agreement.[6]

Another version of what is essentially the same idea is petitioner's argument that a § 8(f) agreement is "*only* a preliminary step which envisions further acts before

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the employer in that case breached the § 8(f) agreement which he had signed in order to select a work force hostile to the union. The employer in that case was thus seeking to benefit from his own wrong in breaking his promise.

[6] A further defect in this portion of petitioner's argument is that it distorts the passage in the *Higdon* opinion, 434 U.S. at 350, from which it quotes. This errro, which is repeated at Pet. Br. 29, is discussed at pp. 14-15 *infra*.

it becomes a binding collective bargaining agreement." (Pet. Br. 29, emphasis in original). This argument rests entirely on a distortion of *Ruttman Construction Co.*, 191 NLRB 701, 702, quoted in *Iron Workers*, 434 U.S. at 345, and of *Iron Workers* itself. *Ruttman* (as *Iron Workers* recognizes) addresses only the issue whether noncompliance with a § 8(f) agreement before the union achieves majority status is a refusal to bargain in violation of § 8(a)(5). The pertinent passage in *Ruttman* reads as follows:

> It is clear, however, that in enacting Section 8(f) to assist in resolving such problems, Congress merely permitted parties to enter into such prehire agreements without violating the Act. It does not mean that a failure to abide by such an agreement is automatically a refusal to bargain. In essence, therefore, this prehire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship; such actions may include the execution of a supplemental agreement for certain projects or covering a certain area and the hiring of employees who are usually referred by the union or unions with whom there is a prehire agreement. These subsequent actions with respect to District 50 never transpired and a full bargaining relationship between District 50 and the Respondent never reached fruition as to this project or location. [191 NLRB at 702, footnote omitted, emphasis added.]

The point of overriding importance is what the Board did not say—*viz.*, that a prehire agreement is unenforceable in a breach of contract suit. The Board did not say so because that issue, which is the issue in this case, was not before the Board, having been committed by Congress to the courts. (See pp. 10-11, *supra.*)

Petitioner also quotes as follows from the *Iron Workers* opinion: "When the union successfully seeks majority support, the prehire agreement attains the status of a collective bargaining agreement . . ." (Pet. Br.

29, citing 434 U.S. at 350). The actual sentence in this Court's opinion is as follows:

> It is also undisputed that when the union successfully seeks majority support, the prehire agreement attains the status of a collective-bargaining agreement *executed by the employer with a union representing a majority of the employees in the unit.* [434 U.S. at 349-350, emphasis showing the material elided by petitioner.]

The concluding portion of the sentence, which petitioner omits, makes clear in what sense the prehire agreement is a "preliminary step": It is a preliminary step to a collective bargaining agreement between an employer and a *majority representative.* The Court did not say that it is a "preliminary step" in the sense contended for by petitioner—*viz.*, a step preliminary to a binding agreement as, to give a familiar example, negotiations are a preliminary step to such an agreement.

(4) Perhaps petitioner's dominant theme is that its interpretation is necessary to preserve employee "freedom of choice." It is by no means novel for employers to pose as their employees' protectors (cf. *Adair v. United States*, 208 U.S. 161), but petitioner's argument is especially cynical. Petitioner would vindicate its employees' freedom of choice by denying them a portion of the prescribed compensation for the labor they have already performed.[7] Petitioner's position in fact nullifies employee

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[7] In disputing that enforcement of the agreement would benefit the employees, petitioner cites *Carpenters Pension Fund v. Sorenson*, 108 LRRM 2988 (N.D. Ill.) (Pet. Br. 35). The court there assumed without any basis, that the payment to the pension fund might have eroded wages which the employees would otherwise have received, and implicitly assumed (contrary to the judgment of millions of employees who through their union bargain for payment to pension funds) that the employees would prefer to have the employer make wage payments. The *Carpenters* court also said that "it is for the employees to decide" and that "the union must show that it has majority support." This reasoning simply overrides

freedom of choice also because on its view either the employer or the union could abrogate the agreement at any time, and could do so both prospectively and *retrospectively* without regard to the employees' desires.

The Congressional design of § 8(f), on the other hand, accommodates all the interests involved. As previously discussed, the § 8(f) proviso enables the employer, employees or union to call for a representation election at any time. If the union wins the election, it attains the same status under § 9(a) as if the bargaining relationship had not originated in a prehire agreement. If, however, the union loses the election the prehire agreement is terminated because the privilege created by § 8(f) is then lost. (See 434 U.S. at 345, quoted at p. 8, *supra.*) Thus, § 8(f) enables the employees to invoke the Board's election procedures and either terminate the contract for the future by voting against the union or to make the contract a full fledged collective bargaining agreement by voting in favor of the union.

In short, petitioner's invocation of employee freedom of choice in order to render § 8(f) agreements unenforceable is "inadmissible here, for the reason that that accommodation between these competing factors has already been made by Congress." (*Machinists Local v. Labor Board*, 362 U.S. 411, 428) Justice Harlan's reasoning in *Machinists* is highly relevant:

> [It is a commonplace, but one too easily lost sight of, that labor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The "policy of the Act" is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figures, however weightily, in it. Cf. note 7, ante. It may be asserted, without fear of contradic-

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the Congressional decision in § 8(f) to authorize unions to enter into prehire agreements without majority support.

> tion, that the interest in employee freedom of choice is one of those given large recognition by the Act as amended. But neither can one disregard the interest in "industrial peace which it is the overall purpose of the Act to secure." *Labor Board* v. *Childs Co.*, 195 F.2d 617, 621-622 (concurring opinion of L. Hand, J.). [362 U.S. at 428.]

In enacting § 8(f) the compensating check to safeguard employee free choice which Congress provided is that the affected employees are to be protected by enabling them to call at any time for an election through which they may abrogate the § 8(f) agreement. And *Iron Workers* decided that those employees would be further protected, by virtue of § 8(b)(7)(C), against picketing to compel them to choose the union as their representative. But Congress did not invest employees with the dubious freedom of working under an agreement which the employer and the union could nullify at any time, even where the consequences would be—as petitioner urges here—that the employer could avoid paying in full for their labor.

(5) Petitioner argues finally that judicial enforcement of § 8(f) agreements would be contrary to what this Court *Lion Dry Goods, supra.* In *Lion Dry Goods* the Court read the word "contracts" in § 301 as *not* limited to agreements between employers and exclusive bargaining representatives.[8] Section 8(f) was referred to as an example of a contract between an employer and a union that does not have majority status, and the Court said that "nothing supports the improbable Congressional intent that the federal courts be closed to such contracts." (369 U.S. at 27. See also *id.* at 29.)

In *Iron Workers* the Court responded to the argument that "permitting an employer to repudiate a prehire agreement until the union attains majority support renders the contract for all practical purposes unenforceable

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[8] Justice Frankfurter, no enthusiast for § 301(a), dissented on another point but agreed with the Court's holding in this regard. See 369 U.S. at 30.

[and would be] contrary to" *Lion Dry Goods* (434 U.S. at 351) by stating

> There, the Court's opinion recognized that § 301 of the National Labor Relations Act confers jurisdiction on the federal courts to entertain suits on contracts between an employer and a minority union, as well as those with majority-designated collective bargaining agents. Section 8(f) contracts were noted as being in this category. The Court was nevertheless speaking to an issue of jurisdiction. That a court has jurisdiction to consider a suit on a particular contract does not suggest that the contract is enforceable. It would not be inconsistent with *Lion Dry Goods* for a court to hold that the union's majority standing is subject to litigation in a § 301 suit to enforce a § 8(f) contract, just as it is in a § 8(a)(5) unfair labor practice proceeding and that absent a showing that the union is the majority's chosen instrument, the contract is unenforceable. [434 U.S. at 351-352.]

The foregoing passage states that *Lion Dry Goods* in determining that the federal courts have jurisdiction over suits for violation of a § 8(f) agreement left open the question whether a union's majority status may be raised as a defense in a § 301 suit. But the question thus identified was not decided in *Iron Workers* either. Nor was a decision of the issue implicit in the *Iron Workers* conclusion that the Board was correct in its interpretation of §§ 8(a)(5), 8(b)(7)(C) & 8(f). (See pp. 10-12, *supra*.) The question being open, we submit that the reasoning of *Lion Dry Goods* (369 U.S. at 25-29) is sound and should be followed to the conclusion that the defense that the union did not have majority status should not be entertained in a § 301 suit.[9]

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[9] See also *New Mexico Dist. Council, Etc. v. Mayhew Co.*, 664 F.2d 215, 217-218 (C.A. 10) and cases cited *id.*; *Glaziers & Glassworkers Local Union No. 767 v. Custom Auto Glass Distributors*, —— F.2d —— (C.A. 9 No. 79-4199 October 12, 1982).

C. Petitioner contends also that the § 8(f) agreement here is the product of unlawful duress and should for that reason not be enforced. But all that happened in this instance is that a general contractor bound by a "union signatory subcontracting" clause in its collective bargaining agreement made lawful by § 8(e)'s construction industry proviso, advised that petitioner must as a condition of doing work for the general contractor sign the instant § 8(f) agreement. As the Court noted in *Woelke & Romero, supra*, the petitioners there

> contend[ed] that if the subcontracting clauses at issue here are approved, the unions will have a powerful organizing tool. Subcontractors will not be able to obtain work unless their employees are represented by the union. Thus, they will force their employees to become members of the union. In effect, the subcontracting clauses will create a "top-down" pressure for unionization; they will take the representation decision out of the hands of the employees and place it in the hands of the employers. [50 L.W. at 4543.]

The Court responded:

> It is undoubtedly true that one of the central aims of the 1959 amendments to the Act was to restrict the ability of unions to engage in top-down organizing campaigns. See *Connell Construction Co.*, 421 U.S., at 632 (discussing legislative history). It is also true that secondary subcontracting agreements like those at issue here create top-down organizing pressure. However, even if the agreements were limited in application to jobsites at which both union and nonunion workers were employed, there would be some top-down organizing effect. Such pressure is implicit in the construction industry proviso. The bare assertion that a particular subcontracting agreement encourages top-down organizing pressure does not resolve the issue we confront in this case: how much top-down pressure did Congress intend to tolerate when it decided to exempt construction site projects from § 8(e)? As we have already explained,

> we believe that Congress endorsed subcontracting agreements obtained in the context of a collective-bargaining relationship—and decided to accept whatever top-down pressure such clauses might entail. Congress concluded that the community of interests on the construction jobsite justified the top-down organizational consequences that might attend the protection of legitimate collective-bargaining objectives. [50 L.W. at 4543; footnote omitted].

Sections 8(e) and 8(f) were enacted at the same time as part of the same legislation. Petitioner's suggestion that the effect of making agreements such as that here lawful through § 8(f) is to preclude enforcement of equally lawful § 8(e) agreements is too paradoxical to entertain. Rather, as *Woelke & Romero* shows, the choice to which petitioner was placed here—to sign a § 8(f) agreement or not to work for a general contractor bound by a § 8(e) union signatory subcontracting clause—is one Congress contemplated and approved as consistent with the national labor policy; it is not a choice that Congress conceived to be illegal duress.

CONCLUSION

For the above-stated reasons, the judgment below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2150

JIM MCNEFF, INC., *Petitioner,*

v.

FRANK L. TODD, *et al., Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF THE ASSOCIATED BUILDERS AND CONTRACTORS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF THE ASSOCIATED BUILDERS AND CONTRACTORS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

This brief is submitted by the Associated Builders and Contractors as an amicus curiae pursuant to Rule 36 of this Court.

The Associated Builders and Contractors (herein ABC) is a non-profit, voluntary association composed of approximately seventeen thousand construction and construction supply companies. Most of these member companies operate on an open shop basis and are wedded to the "merit shop" philosophy, i.e., that the opportunity to bid and compete for construction work should be exclusively based on a company's ability to operate efficiently and provide quality service at a reasonable cost.

ABC member companies perform the majority of their work in the commercial, industrial and institutional areas. Eighty-five percent of ABC's members do commercial work. It is common practice in the commercial construction industry for general contractors to subcontract work on the same project to both union and nonunion employers. It is also a common practice in the construction industry for union representatives to threaten general contractors with job actions, e.g., work stoppages, work slowdowns or strikes, if nonunion subcontractors are allowed to start work without first signing a union contract. Consequently, many ABC employers have had to confront the dilemma of either signing a pre-hire agreement with a union or foregoing work which they desperately may need.

Unions which have gained pre-hire agreements from ABC members, and thereafter not achieved majority support among the ABC employer's employees, have been allowed by the courts to act as the unit employees' collective bargaining representative for the purpose of judicially enforcing these pre-hire agreements.

The prevailing statutory policy of the federal labor laws is that a union cannot purport to act as the collective bargaining agent for all employees until it is recognized as such by a majority of all the employees in an appropriate bargaining unit. Furthermore, it is not certain that payments toward a union trust fund, on behalf of ABC employees covered by a pre-hire agreement, is to their benefit. As an economic matter these payments might erode wages which otherwise would be paid into an established employee trust fund that is administered by the ABC employer. As a practical matter, the typical ABC employee will not be covered by enough pre-hire agreements, over his lifetime, to satisfy the union trust fund criteria

for receiving benefits. The ABC employer's contributions to union trust funds will thus ultimately be a disservice to his own employees. However, an even greater disservice is done to these employees by courts that enforce these pre-hire agreements when a majority of the employees have never expressed support for the idea of union representation.

Accordingly, the ultimate resolution of the issues presented here is of vital interest and utmost concern to ABC, its members and their employees.

SUMMARY OF ARGUMENT

The Court of Appeals ignored the spirit and the letter of the decision in *NLRB* v. *Local 103, Iron Workers*, *infra*, by isolating the word "voidable" from the context in which it was used by this Court. Although a "voidable" contract is normally enforceable until repudiated by one of the parties, a pre-hire agreement is not because of the qualifications and exceptions of federal labor policy.

The Court in *NLRB* v. *Local 103, Iron Workers* did not decide the issue of the enforceability of pre-hire agreements in the narrow context of unfair labor practice cases. Rather it examined the panoply of federal labor laws in deciding not to give minority pre-hire contracts the same stature and enforceabiiity as mature collective bargaining agreements.

In the case below, the Petitioner was coerced into sigining a pre-hire agreement in contravention of Congressional intent to only validate collective bargaining agreements between construction employees and minority unions that are arrived at voluntarily.

Courts should not enforce minority pre-hire agreements since the unit employees have never expressed

support for the signatory union and, as a practical matter, many of the employees covered by pre-hire agreements will not be able to qualify for any benefits from the union trust funds.

I. The "Voidable" Nature Of Minority Pre-Hire Agreements Does Not Mean They Are Fully Enforceable Until Repudiated By One Of The Contracting Parties.

The Circuit Court below relied heavily on language in *NLRB* v. *Local 103, Iron Workers*, 434 U.S. 335 (1977) to support its characterization of minority pre-hire agreements as "voidable" and enforceable until properly repudiated by one of the parties. The court also relied heavily on contract law principles in finding that a "voidable" agreement is enforceable until repudiated by an affirmative act of one of the parties. The court erred by applying contract law doctrines to an 8(f) contract (see 29 USC § 158(f)) because "[a] collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts." *Transportation-Communication Employees* v. *Union Pacific R.R. Co.*, 385 U.S. 157 (1966). This is because labor contracts involve the representation rights of employees, not just the employer-union relationship. Not only are contract law principles not entirely applicable to pre-hire agreements, but certain parts of the National Labor Relations Act do not apply as well. Section 8(d) of the Act, 29 USC 158(d), requires that written notice be given to the other party at least 60 days prior to the proposed termination of the contract. However, section 8(d) has been held inapplicable to pre-hire agreements which do not have the stature of collective bargaining agreements. *Trustees of the Atlanta Iron Workers, Local 387 Pension Fund* v. *Southern Stress Wire Corp.*, 509 F. Supp. 1097 (1981).

Moreover, there is nothing in this Court's decision in *NLRB* v. *Local 103, Iron Workers, supra*, that suggests that a pre-hire agreement is enforceable unless the signatory employee sends a written notice to a union exclaiming an intent to dishonor the agreement. Rather this Court in *NLRB* v. *Local 103, Iron Workers, supra*, fully adopted the NLRB's rationale that "a pre-hire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship" and that "Congress merely permitted parties to enter into such pre-hire agreements without violating the Act. It does not mean that failure to abide by such an agreement is automatically a refusal to bargain" *Ruttman Construction Co.*, 191 NLRB 701 (1971).

This Court in *NLRB* v. *Local 103, Iron Workers, supra*, also embraced the NLRB's decision in *R. J. Smith Construction Co., Inc.*, 191 NLRB 693 (1971). The union in *Smith* charged the employer with failing to pay union wage rates and to contribute to the union's trust funds in violation of their pre-hire agreement. The employer and the union had made two separate pre-hire agreements with the union. The first agreement was completely ignored by both parties. The employer did not pay his employees union wages or fringe benefits and the union never sought to enforce the terms of the agreement. The second pre-hire agreement was ignored for the first seven months by the employer and thereafter he only made contributions on behalf of two union member employees but not at all for his nonunion employees. The Board held that "at the time of Respondent's repudiation, indeed at all times the union failed to enjoy majority support" *Smith, supra*, and that the contract was, therefore, never enforceable. The NLRB made no mention in *Smith* or *Ruttman* of a requirement that the (minority) 8(f) agree-

ment also had to be affirmatively repudiated by one of the parties to avoid a bargaining order. In light of this Court's adoption of these Labor Board holdings in *NLRB* v. *Local 103, Iron Workers, supra*, it is clear that its use of the word "voidable" to characterize pre-hire agreements did not mean that an employer could still be liable for union back wages or fringe benefits until he affirmatively repudiated his 8(f) agreement with a minority union. Significantly, this Court did not even feel that 8(f) contracts attained the status of a full collective bargaining agreement *after* the union had achieved majority support among unit employees. In the Court's view an 8(f) agreement is not protected by the "contract bar" rule that normally protects incumbent unions from challenge to their bargaining representative status during the term of the contract. "The employer and its employees and the union itself for that matter may call for a bargaining representative election at any time." *Id.* at 352; and that the enforceability of an 8(f) agreement was contingent upon the union attaining majority support at the various jobsites. *Id.* at 352. Cf. *Dee Cee Floor Covering*, 232 NLRB 421 (1977) ["the mere fact that the Union might indeed have represented a majority of the employees at the employer's jobsite is of no consequence since the union must demonstrate its majority status at each new jobsite in order to invoke the provisions of section 8(a)(5)"].

II. The Court Below Wrongly Concluded That The Enforceability Of Pre-hire Agreements Was Resolved By This Court In *NLRB* v. *Local 103, Iron Workers*, 434 U.S. 335 (1977), Only As To Unfair Labor Practice Cases

Several Circuit Courts of Appeals have wrongly limited the holding of this Court in *NLRB* v. *Local No. 103, Iron Workers, supra*, to the narrow factual context in

which the case arose. *See Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan* v. *Associated Wrecking Co.*, 638 F.2d 1128 (8th Cir. 1981); *New Mexico District Council of Carpenters* v. *The Mayhew Co.*, 664 F.2d 215 (10 Cir., 1981). In reaching their decisions the Eighth and Tenth Circuits distinguished *NLRB* v. *Local 103, Iron Workers, supra*, on the basis that this Court had discussed the nature of pre-hire agreements in the context of unfair labor practice charges only and not, as in *Associated Wrecking* and *Mayhew*, in the context of a section 301 breach of contract suit. In *Associated Wrecking* the court concluded that the fringe benefit provisions (i.e., employer contributions to various union trust funds) of a pre-hire agreement could be enforced against the employer in a breach of contract action even though the union's majority status had never been demonstrated. While it is true that *NLRB* v. *Local 103, Iron Workers* did not factually deal with the question of the nonenforceability of a pre-hire agreement as a defense to a breach of contract suit, this Court clearly spoke to that very issue. The union in *NLRB* v. *Local 103, Iron Workers, supra*, asserted that by permitting an employer to repudiate a pre-hire agreement until the union attains majority support rendered the contract unenforceable and, therefore, contrary to this Court's decision in *Retail Clerks International Ass'n* v. *Lion Dry Goods, Inc.*, 369 U.S. 17 (1962). This Court explained that its decision in *Lion Dry Goods* merely held that federal courts have jurisdiction to entertain a section 301 suit based on a section 8(f) contract, but that "it would not be inconsistent . . . to hold that the union's majority standing is subject to litigation in a section 301 suit to enforce a section 8(f) contract, just as it is in a section 8(a)(5) unfair labor practice proceeding, and that absent a showing that the union is the majority's chosen instrument, the contract is unenforceable." *Id.* at 352.

The Eighth and the Tenth Circuits ignored this unequivocal language in upholding the enforceability of the subject pre-hire agreements. In addition, these Circuits mechanically applied the decision in *Lewis* v. *Benedict Coal Corporation*, 361 U.S. 459 (1960), in holding that an employer could not raise normal contract law defenses against union pension fund trustees in a section 301 suit for damages. In *Benedict*, this Court held that a contract that called for contributions to a union pension fund was not a typical third party beneficiary contract, in that the employer could not assert the union's breach of contract as a defense in an action brought by the trustees. Unlike the employer in *Benedict*, the employer here is not a member of any multi-employer bargaining association and has not assumed or been given any responsibility for the management of the union trust funds. Second, and even more significant, the employer in *Benedict* was signatory to a collective bargaining agreement; the consequence of the union having successfully organized Benedict's employees and thereafter being certified as their collective bargaining representative by the National Labor Relations Board. Here, no organizing campaign has ever been attempted, and the employer has not entered into a "long term relationship" with the union but merely a pre-hire agreement with a *minority* union.

This Court recently dimmed the vitality of *Benedict* by upholding employer defenses to collection suits by union pension trustees that are not "unrelated" or "extraneous" to the enforceability of the underlying collective bargaining agreement. *Kaiser Steel Corp.* v. *Mullins*, 102 S.Ct. 851 (1982). The employer in *Benedict*, *supra*, when sued by the trustees for delinquent contributions, defended on the ground that the union had violated the no strike clause contained in the contract. Although the strikes were illegal, the Court held that the company's promise to con-

tribute to the fund was independent of and not conditioned on the union's performance of its promise not to strike. Unlike the employer in *Benedict*, *supra*, the employer in the case below had an obligation to contribute to the union pension fund, that had as a condition precedent, the obtaining of majority support by the union among his employees.

The satisfaction of this condition precedent by the union is not "unrelated" or "extraneous" to the obligation that the employer may have to contribute to the union trust funds. The employer's duty to bargain and honor the contract is contingent on the union attaining majority support at the various jobsites. *NLRB* v. *Local 103, Iron Workers*, *supra*.

Congress did not intend to preclude employers from raising contractual defenses because of the language of Section 306(a) of the Multiemployer Pension Plan Amendments Act of 1980, Pub.L.No. 96-364, 94 Stat. 1208, which provides in part that "every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or agreement." 29 USCA § 1145. Assuming *arguendo* that the 1980 amendments are applicable to the case below, the employer would still not be obligated. Nothing could be more "inconsistent with law" than to judicially enforce a minority pre-hire agreement that has been cashiered by the NLRB in a companion unfair labor practice case proceedings because the union failed to demonstrate its majority status among the unit employees. The National Labor Relations Board has been given by Congress the primary responsibility of effectuating national labor poli-

cy. *Labor Board* v. *Truck Drivers Union*, 353 U.S. 87 (1957). It unquestionably frustrates national labor policy to judicially enforce collection suits brought against employers by union pension trustees for union trust fund payments when the same claim has been rejected by the NLRB in a prior unfair labor practice case because the union never achieved the status of collective bargaining representatives among the unit employees. Nothing in section 306(a) of the Multiemployer Pension Plan Amendments Act assumes that "Congress implicitly repealed the antitrust laws, the labor laws, and any other statute which might be raised as a defense to a provision in a collective bargaining agreement requiring an employer to contribute to a pension fund." *Kaiser*, *supra*.

As the third party beneficiary of the union-employer pre-hire agreement, the trustees of the union trust funds can assert no greater collection rights than that of the union. Since the union cannot enforce the agreement until it achieves the employee designation required by federal labor policy, it follows that the trustees should not be allowed to sidestep this statutory obligation by the simple expedient of suing in its own name.

III. Most Nonunion Employees Will Never Work On Enough "Covered" Projects To Qualify For Any Benefits Of The Union Trust Funds

Most employees who have chosen the "merit shop" way of employment are going to seek out employers who share their work philosophy. A typical ABC employee works approximately two thousand hours a year at construction. The minimum requirement to receive a full pension from an AFL-CIO construction union is that an individual member work for at least ten years at a thousand hours per year (see Appendix).

This means that an open shop employee would have to string together ten years of pre-hire agreement employment at a thousand hours per year before being eligible for union pension benefits. This is highly unlikely because most open shop employers are able to avoid signing any union contract for any length of time. Furthermore, those open shop employers who find no alternative but to sign a pre-hire agreement will not be inclined to simultaneously contribute money into both the health and welfare fund he has set up for his employees and the health and welfare fund belonging to the signatory union. The open shop employer will most likely suspend payment into his own established employee health and welfare fund while he contributes monies into the pre-hire agreement trust funds on behalf of his "covered" employees. As an economic matter, these payments will erode open shop employee wages which otherwise would be paid into an employer established employee trust fund. Therefore, it would be highly inequitable to allow a construction union, which in most cases will never be required to make benefit payments to open shop employees covered by an occasional pre-hire agreement, to enforce these agreements unless at some time during the term of the contract the union was able to convince a majority of the employees that unionization was in their best interests. It is "freedom of choice which is the essence of collective bargaining" *IAM* v. *NLRB*, 311 U.S. 72, 79 (1940).

IV. The Court Below Erred In Finding That Petitioner Was Not Coerced Into Signing A Pre-Hire Agreement

"Congress was careful to make its intention clear that pre-hire agreements were to be arrived at voluntarily, and no element of coercion was to be admitted into the narrow exception being established to the majority principle." *NLRB* v. *Local 103, Iron Workers*, *supra*, at 348

n. 10. The House Conference Report on section 8(f) clearly established that no coercion of any sort was to be utilized to exact pre-hire agreements from unwilling contractors:

> "Nothing in such provision is intended . . . to authorize the use of force, coercion, strikes, or picketing to compel any person to enter into such pre-hire agreements." H.R. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess. (1959), I Legislative History of the LMRDA of 1959, p. 946.

The facts in the present case and those in *NLRB* v. *Local 103, Iron Workers, supra*, are quite similar. Both cases involved a request by a business agent that the contractor sign a pre-hire agreement, followed by a refusal to sign, followed by coercive conduct by the union. In the former, Petitioner refused a union business agent's request to sign a pre-hire agreement, which was followed by a visit and demand from the general contractor that he sign or get off the jobsite. In the latter case, the unwilling contractor's refusal to sign a pre-hire agreement was followed by a picket line. The employer in *NLRB* v. *Local 103, Iron Workers, supra*, was not forced by the business agent to immediately leave the jobsite. In the present case, the business agent put pressure on the general contractor to remove Petitioner from the jobsite, at once, if he did not sign a pre-hire contract.

A threat to force a general contractor to cease doing business with a subcontractor is coercive and, therefore, unlawful under the National Labor Relations Act's secondary boycotts. *NLRB* v. *Denver Bldg. Trades Council*, 341 U.S. 675, 688 (1951).

As this Court said in *NLRB* v. *Local 103, Iron Workers, supra*, "section 8(b)(7) was adopted to ensure voluntary, uncoerced selection of a bargaining representative by employees, we cannot fault the Board

for holding section 8(b)(7) applies to a minority union picketing to enforce a pre-hire contract." Likewise, it would be flatly contrary to the broad congressional ban upon illegal secondary boycotts to ignore the realities of the coercive union activity in the present case.

CONCLUSION

This Court in *NLRB* v. *Local 103, Iron Workers*, *supra*, deferred to the expert judgment of the National Labor Relations Board in finding that minority 8(f) agreements are unenforceable until the union has achieved majority support among the unit employees. The union's trust fund trustees stand in no better position than the union does in asserting the enforceability of 8(f) agreements.

For the reasons stated above, as well as those presented by Petitioner, the Associated Builders and Contractors urges this Court to reverse the below decision of the Court of Appeals.

Respectfully submitted,

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APPENDIX

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Pension Characteristics & Criteria - National Funds

Craft	Requirement to Receive Full Pension	Vesting	Hours to Receive Full Credit for Year	Required for Credit of Past Service	Basis of Benefits of Normal Pension
Bricklayers	Age 65 with 10 years pension credit including 1,500 hours future service or 10 years vested service.	10 years vesting service (1,000 hrs/yr) or 10 pension credits including 5 of future service.	1,500; 10% credit for each 150 hours.	750 hours worked in 2 of 3 years prior to contributions or 5 years future service; year credit per 750 hours.	Contributions for last 1,500 hours (see table).
Carpenters[1/]					
Electricians[2/]	Age 65 with 10 years employment.	10 years employment.	1,000; partial credit for each hour in years with more than 300 hours worked.	Not specified; 5 years maximum credit.	$6 per year of service credit.
Elevator Constructors	Age 65.	10 years employment and 12,000 hrs. in a 10-year period.	Credit for each hour in years with more than 700 hours worked.	Health & Welfare fund contribution for each month of service prior to 6/62.	$15 per year of past service and 1,700 hours of future service.
Laborers	Age 65 with 10 years pension credit, including 4 quarters of contributions.	10 years credited service, including 5 with contributions.	1,000; 25% credit for each 250 hours.	Annual earnings greater than or equal to 50% of Social Security base amount.	Contributions for last 1,000 hours.
Operating Engineers	Age 65 with 10 years vested service.	10 years service at 1,000 hours per year.	1,000; 10% credit for each 100 hours in years with more than 400 hours worked	Years worked after age 35.	2% of total contribution plus 20 times average hourly contribution times past service years.

*Statistics compiled by the Construction Labor Research Council, a service bureau of the AFL-CIO, Building Trades Council and the Associated General Contractors.

Craft	Requirement to Receive Full Pension	Vesting	Hours to Receive Full Credit for Year	Required for Credit of Past Service	Basis of Benefits of Normal Pension
Painters/ Glaziers 3/	Age 65 with 3,000 units of credit (25 years), including 12 units of contributions.	10 years service at 1,000 hours per year.	1,800; 1 unit for each 150 hours.	900 hours worked in 2 of 3 years prior to contributions; 1 unit/75 hours worked up to 12 in year.	Contributions for last 12 units (see table).
Pipefitters/ Plumbers	Age 65 with 25 years pension credit, including 1 year of contributions.	10 years credits at 870 hrs. per yr.	1,500; 10% credit for each 150 hours.	2,250 hours worked in 3 years prior to contributions (750 with contributing employer), then credit for years with 750 hours.	Contribution for last 1,500 hours (see table).
Sheet Metal Workers	Age 65 with 25 years credited service, including 12 months future service credit.	10 years vested service, including 5 years of future service.	1,200; 8.33% credit for each 100 hours.	150 days worked or $2,500 earned in 2 of 3 years prior to contributions or 60 months future service.	Contributions for last 12 months.

1/ Trustee and administrator did not supply data.

2/ Usually also a local pension.

3/ Maximum of 24 years past service.

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No. 81-2150

IN THE

Supreme Court of the United States

October Term, 1982

JIM MCNEFF, INC.,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

MOTION OF THE CARPENTERS TRUST FUNDS FOR SOUTHERN CALIFORNIA, THE CONSTRUCTION LABORERS TRUST FUNDS FOR SOUTHERN CALIFORNIA AND THE CEMENT MASONS TRUST FUNDS FOR SOUTHERN CALIFORNIA FOR LEAVE TO FILE BRIEF *Amici Curiae* AND BRIEF *Amici Curiae* IN SUPPORT OF RESPONDENTS.

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No. 81-2150

IN THE

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FRANK L. TODD, *et al.*,

Respondents.

MOTION OF THE CARPENTERS TRUST FUNDS FOR SOUTHERN CALIFORNIA, THE CONSTRUCTION LABORERS TRUST FUNDS FOR SOUTHERN CALIFORNIA AND THE CEMENT MASONS TRUST FUNDS FOR SOUTHERN CALIFORNIA FOR LEAVE TO FILE BRIEF *Amici Curiae*.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Supreme Court Rule 36(3), the Carpenters Trust Funds for Southern California, the Construction Laborers Trust Funds for Southern California and the Cement Masons Trust Funds for Southern California hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of counsel for the Petitioner and Respondents was requested and was withheld.

These amici have an interest in the outcome of this case because they are parties to more than 250 cases pending in

state and federal courts in California in which the issue of the enforceability of Section 8(f) pre-hire agreements is raised.

In the instant case, Petitioner argues in effect that the collective bargaining agreement that it signed was void *ab initio*. A ruling to that effect could be most damaging to our client trust funds.

Respectfully submitted,

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No. 81-2150
IN THE

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JIM MCNEFF, INC.,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

BRIEF *Amici Curiae* IN SUPPORT OF RESPONDENTS.

Interest of the *Amici Curiae*.

Amici curiae, Carpenters Trust Funds for Southern California, Construction Laborers Trust Funds for Southern California and the Cement Masons Trust Funds for Southern California are comprised of the following employee benefit plans:

Carpenters Pension Trust for Southern California

Carpenters Health and Welfare Trust for Southern California

Eleven County Carpenters Vacation Savings and Holiday Plan

Carpenters Joint Apprenticeship and Training Committee Fund for Southern California

Construction Laborers Pension Trust for Southern California

Laborers Health and Welfare Trust for Southern California

Construction Laborers Vacation Trust for Southern California

Laborers Training and Retraining Trust for Southern California

Cement Masons Southern California Pension Trust

Cement Masons Southern California Health and Welfare Fund

Eleven Counties Cement Masons Vacation Savings Plan

Cement Masons Joint Apprenticeship Trust

Cement Masons Southern California Individual Retirement Account Trust

Each of these trusts is a multiemployer employee benefit plan created pursuant to collective bargaining between employers and unions; each was organized and is administered pursuant to the provisions of Section 302(c) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §186(c).

Over 50,000 carpenters, laborers and cement masons are active participants in these *amici* trust funds. Approximately 21,000 retired individuals are currently receiving pension benefits from the pension trust *amici*. Payments to these retirees find their primary source in the regular contributions made by employers pursuant to their respective collective bargaining agreements.

Contributions to the Carpenters Trust Funds are made by approximately 2,500 employers. The Construction Laborers Trust Funds receive contributions from more than 3,700 employers. Over 900 employers make contributions to the Cement Masons Trust Funds. Of this group of employers, a substantial number *may* have signed Section 8(f) agreements with the unions. Thus, the Court's decision will po-

tentially affect a majority of the Trusts' contributors, which may undermine the trusts' income stream and their ability to serve their participants.

Summary of Argument.

Amici wish to present three essential points of concern:

I. The void *ab initio* approach[1] imposes such a great hardship on trust funds that it offends national labor policy. The vested rights of these intended third party beneficiaries cannot and should not be divested retrospectively.

II. The Fifth Circuit's void *ab initio* approach does not withstand critical analysis and is inconsistent with the law developed by the National Labor Relations Board and the Court.

III. Payments to an employee benefit fund do not run counter to the policies of the Act[2] as expressed in Sections 7, 8 and 9 thereof. Therefore, compelling an employer to live up to its obligations serves the policy goals of Section 301(a) in that it preserves contract rights and bargained-for consideration as well as preserving the actuarial soundness of pension and health and welfare plans.

---

[1]The term void *ab initio* approach" is a shorthand expression used to refer to the holding in *Baton Rouge Building and Construction Trades Council v. E.C. Schafer Construction Co.*, 657 F.2d 806 (5th Cir. 1981), wherein the Fifth Circuit determined that Section 8(f) pre-hire agreements are void and unenforceable prior to the time that the unions signatory to the agreements represent a majority of the employers' employees.

[2]The term "Act" is used throughout to mean the National Labor Relations Act of 1935, as amended, 29 U.S.C. §151 *et seq.*

ARGUMENT.

I.

As a Matter of National Labor Policy, Pre-Hire Agreements Cannot Be Held to Be Void *Ab Initio* For to Do So Would Work a Severe Hardship on Employee Benefit Plans.

The fringe benefits provided to employees through Taft-Hartley trust funds have become an important part of our national labor policy. Congress has seen fit to regulate extensively in this area. The courts, pursuant to the mandate of Sections 301 and 302 of the Act, have developed and continue to develop a federal common law concerning the relationships between employer, employee, labor union and trustees of Taft-Hartley trust funds.[3] These *amici* speak from the latter viewpoint as neutrals in labor-management matters. Under collective bargaining agreements, of whatever stripe, the trustees have the right and duty to enforce the employer's promise to pay. As long ago stated by the Court: "The trustees stand in the shoes of the employees and are entitled to enforce their rights." *United States v. Carter*, 353 U.S. 210, 220 (1957). The trustees herein advocate the interest of the thousands of employees covered by their employee benefit plans. We believe that it is important for the Court to understand the severe hardship that will befall the trusts and the employees, if Petitioner prevails.

These *amici*, like the Respondent trust funds and others similarly situated, rely on timely employer contributions to fund the employee benefit programs they offer. Some con-

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[3]The term "Taft-Hartley trust funds" is a shorthand expression used to refer to employee fringe benefits trusts established pursuant to collective bargaining and administered pursuant to the strictures of Section 302(c) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §186(c). ("The Act" or "LMRA").

tributions to the trust funds come from employers who are members of various employer associations. In addition, these *amici* receive contributions from approximately 3,700 employers who are not members of an employer association. This latter group of employers, colloquially called "short formers," have some form of collective bargaining agreement with the unions. These agreements may be pre-hire agreements that have ripened into full majority status agreements. They may also be majority status agreements from the start. These agreements could also be pre-hire agreements that have not ripened into full majority status agreements. On their face, the employer recognizes the union as the exclusive bargaining representative of the employees in that craft. As employers go in and out of the construction business, like agreements are signed and copies routinely furnished to the trustees. At no point are the trustees in a position to know or ascertain the actual relationship between the union and the "short-form" employer. What was a pre-hire agreement yesterday, may have ripened into a full majority status agreement next week or next month.

The trustees can and do rely on the full enforceability of these agreements. The trust funds use these facially valid employer commitments to structure the benefit programs in a prudent manner. Employer contributions are used by the trusts to pay both current benefits and to provide for the future welfare of retirees. The pensions of these retired beneficiaries are directly tied to employer contributions, and are wholly dependent upon the ability of the trusts to collect these promised payments. Expert pension advisors base their evaluation of the financial health of a trust and its future, in part, on the number of signatory employers and covered employees. If the void *ab initio* approach is accepted by this Court, these evaluations and forecasts will be useless and the trustees will be on quicksand, never knowing when

contributions will be abruptly halted. As indicated above, the trustees do not know and can not ascertain the precise collective bargaining status of thousands of employers as they move in and out of collective bargaining relationships with the unions.

These *amici* perceive a further hardship resulting from the void *ab initio* approach. Such a holding arguably means that the trust funds would have to prove in every collection case that at the time that they received the employer's contribution the unions represented a majority of the employer's workforce.

The extreme difficulty, if not impossibility, of this task becomes apparent when it is realized that in the construction industry an individual employee typically works for many employers and none of them continuously. Jobs are frequently of short duration and the workforce is extremely mobile. *See Pacific Northwest Chapter, Etc. v. N.L.R.B.*, 654 F.2d 1301 (9th Cir. 1981); *affirmed as modified*, ... U.S. ...., 102 S.Ct. 2071 (1982). It is entirely conceivable that many years after the employee has completed his work, when the issue of majority status is raised, the employee may be out of reach, mentally incapacitated, or even deceased.

The problem would be especially acute among the employees who worked for small employers, the ones most inclined to enter into Section 8(f) agreements. Many of these small employers employ only two or three individuals at any given time. The absence or incapacity of just one or two of the employees might mean that the trust funds could never prove that the union represented a majroity of the

employer's workforce at the time that delinquencies were incurred.[4]

Fringe benefit trust funds such as health and welfare, vacation, training and apprenticeship trusts all expend funds currently for the benefit of beneficiaries. A void *ab initio* holding would put these trust funds in the difficult position of trying to recoup these already-expended funds from the beneficiaries. It is highly unlikely, however, that any effort to recoup funds from such diverse groups of individuals would be successful. Surely, Congress could not have intended for these hardships to fall on trust funds and employees.

Comprehensive pension legislation adopted by Congress in the form of ERISA in 1974[5] and the MPPAA in 1980,[6] demonstrates its concern for the continued soundness of employee benefit plans. This concern has also become an important part of our national labor policy. The view that pre-hire agreements are void would materially compromise the thrust of these enactments. Congress specifically found that the financial soundness and stability of multiemployer pension plans were express purposes behind the enactment of the MPPAA because "the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension

---

[4]Some employers have also argued that the trust funds must prove majority status as a condition to discovery of an employer's payroll records. Moreover, it is no answer to say that the trustees could just examine the records to determine whether, at the time in question, an employee was a member of the union or not. This is because "it is well established that union membership is not always an accurate barometer of union support." *Authorized Air Conditioning Co. v. N.L.R.B.*, 606 F.2d 899, 906 (9th Cir. 1979), *cert denied*, 445 U.S. 950 (1980).

[5]Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829, *et seq.* (September 2, 1974).

[6]Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, *et seq.* (September 26, 1980).

plans."[7] To this end, Section 306(a) of the MPPAA was enacted which added Section 515 to ERISA (29 U.S.C. §1145) and which allows for the collection of delinquent contributions by trustees of multiemployer plans.

Section 515 provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such agreement.

Senator Williams, one of the co-sponsors of the section, reiterated the national labor policy behind Section 306(a):

> "It is essential to the financial health of multiemployer plans that they and their actuaries be able to rely on any employer's contribution promises. [P]lan participants for whom the employer promises to make pension contributions to the plan in exchange for their labor are entitled to rely on their employer's promises."[8]

In contending that Section 8(f) agreements are void *ab initio* and hence no contract was formed, Petitioner ignores well settled principles of contract law. In the instant case, all of the elements of a bargained-for exchange were present. As the Court of Appeals found, Section 8(f) agreements allow benefits to flow to both union and employer—not the least of which is labor peace in exchange for payment of union wages and fringe benefits.

It is a settled principle of federal labor law that Taft-Hartley trust funds are intended third party beneficiaries of collective bargaining agreements. *Lewis v. Benedict Coal*

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[7]29 U.S.C. §1001a(a)(3). The trust funds are "multiemployer plans" within the meaning of the MPPAA. 29 U.S.C. §1002(37).

[8]126 CONG. REC. §10102 (daily ed. July 29, 1980).

Corp., 361 U.S. 459 (1960); *Kaiser Steel Corp. v. Mullins*, ... U.S. ..., 102 S.Ct. 851 (1982). As such, they are innocent third parties who rely on the employer's promise to the union that it will contribute to the trust funds on behalf of its employees. It is apparent that the relief Petitioner seeks is tantamount to recision of its agreement. However, it is fundamental law that the rights of intended beneficiaries, such as the trust funds, vest when such beneficiaries change their position in justifiable reliance on the validity of contracts; and, that parties to a contract may not recind when such rights have vested. *See RESTATEMENT (SECOND) OF CONTRACTS* §311 (1979); *Manning v. Wiscombe*, 498 F.2d 1311 (10th Cir. 1974).

It is submitted, therefore, that under comprehensive employee benefit legislation and the Court's prior holdings on the nature of trust funds that the void *ab initio* approach is incompatible with national labor policy.

II.

The Void *Ab Initio* Approach Is Incorrect as a Matter of Law.

Petitioner contends that construction pre-hire agreements are void *ab initio* unless the union affirmatively demonstrates majority status. This contention rests primarily on the Fifth Circuit case of *Baton Rouge Building and Construction Trades Council v. E.C. Schafer Construction Co.*, 657 F.2d 806 (1981).[9] The Fifth Circuit's opinion is notable primarily for its failure to discuss the critical issue presently before the Court. In *Schafer*, the Fifth Circuit (at p. 809) recites the familiar rules dealing with Section 8(f) as an exception to the general prohibition against pre-hire agree-

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[9]It also rests, to a lesser extent, upon the Eleventh Circuit case of *Laborers District Council, Etc., et al. v. McDowell Contractors, Inc.*, ... F.2d .... 110 LRRM 2965 (1982).

ments and the need for such agreements to ripen into full majority status collective bargaining agreements. From these established principles, the Fifth Circuit leaps into the untenable conclusion that pre-hire agreements are void *ab initio*. As we show below, the Fifth Circuit has misread the law as it has been developed by the Court and the National Labor Relations Board.

In deciding that the pre-hire agreement was void *ab initio*, the Fifth Circuit relied primarily on certain language from the Court's opinion in *NLRB v. Local Union No. 103, International Association, Etc. (Higdon)*, 434 U.S. 335, 351-52 (1978). In so doing, the Fifth Circuit failed to observe the context of these statements and that the language relied upon is plainly dictum.

In the *Higdon* majority opinion, the entire discussion of enforceability by lawsuit occurred subsequent to the Court's critical finding that pre-hire agreements are "voidable" up until the time that the union achieves majority status. The Court, having sustained the Board on that critical issue, could well have terminated its opinion at that point. However, the Unions had advanced an argument based on the Court's prior holding in *Retail Clerks International Association v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962). The Court's opinion, therefore, went on to distinguish that case on the basis that it dealt with the jurisdiction of the federal courts. It is clear, however, that the Court's discussion of *Lion Dry Goods*, *id.* and the enforceability by lawsuit of pre-hire agreements was offered in a rebuttal to the contentions advanced by the Unions.[10] They had argued that the

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[10]In *Higdon*, neither the Board nor Local Union No. 103 thought enough about the relevancy of *Lion Dry Goods* to even cite that case in their briefs to the Court. It appears that *Lion Dry Goods* was first mentioned by the *Amicus Curiae* brief of the AFL-CIO. Brief for the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae*, pp. 12-13, reprinted by Law Reprints, Inc., Labor Series, vol. 11, No. 4, 1977/1978 Term.

Board's voidability rule conflicted with the law as it had developed under Section 301(a) of the Act—observing correctly that *Lion Dry Goods* had held that a minority union could enforce its agreements with the employer in a Section 301 suit. From that conclusion, the Unions urged that Section 8(f) agreements could not be voidable in the N.L.R.B. forum and fully enforceable in the federal courts. In the view of the Unions, this alleged inconsistency compelled remand to the Board for reconsideration of its position that such agreements are voidable. In response to the Unions' contention, the Board argued that the Unions' premise, while probably correct, did not necessarily compel the conclusion that a minority union may not subsequently be ousted by vote of the employees pursuant to an N.L.R.B. conducted election. Thus, the discussion of *Lion Dry Goods* by the *Higdon* Court was intended to explain that there was no logical inconsistency between the voidability proposition advanced by the N.L.R.B. and the holding in *Lion Dry Goods* that such agreements are enforceable in a Section 301(a) suit.

In *Schafer*, *supra*, the Fifth Circuit failed to discern that *Higdon* had not overruled *Lion Dry Goods* and that the Court's remarks merely explained why there was no logical inconsistency between the two cases. It is this faulty reading of *Higdon* that misled the court to the erroneous conclusion that labor organizations must prove majority status as a condition to the recovery of damages for breach of contract. In so doing, the Fifth Circuit effectively transformed "voidable" contracts into "void" contracts and failed to see that *Higdon* and *Lion Dry Goods* were intended to co-exist as a joint statement of the law. By contrast, the Ninth Circuit's opinion in the instant case harmonizes these two cases, preserving the Board's voidability rule and at the same time

continuing the court enforceability of collective bargaining agreements.

Lion Dry Goods, when read together with the Court's opinion in *Higdon*, irrefutably establishes the rule that causes of action arising prior to lawful ouster of the union remain enforceable in the courts. Plainly, the void *ab initio* approach is inconsistent with the rule established by the cases of *Lion Dry Goods* and *Higdon*. We urge the Court to specifically disavow this approach in its opinion in the instant case.

III.

Payments to Employee Benefit Plans by a Contractor Pursuant to a Pre-Hire Agreement Do Not Contravene the Policies of the Act.

This past term, the Court, in *Kaiser Steel Corp. v. Mullins*, ... U.S. ...., 102 S.Ct. 851 (1982) the Court held that unlawful agreements are not enforceable in an action under section 301 of the Act. Conversely, labor agreements are fully enforceable if they do not contravene such Act policies as: (1) the Section 7 rights of employees; (2) the prohibition against hot cargo agreements; (3) the exclusive jurisdiction of the Board to establish collective bargaining units pursuant to Section 9(a) of the Act; or (4) the prohibition against unfair labor practices pursuant to Section 8 of the Act. As we show below, the enforcement of the instant agreement does not contravene any policies of the Act and the countervailing policies of Section 301 compel the conclusion that the instant agreement is fully enforceable.

The instant Section 301(a) case involves policy considerations germane to: (1) traditional notions of the sanctity of contract; (2) the rights of innocent third party creditor beneficiaries; (3) the stability of collective bargaining in an entire industry; and (4) the actuarial soundness of employee

pension and health and welfare benefit plans. The void *ab initio* approach adopted by the Fifth Circuit in *Schafer, supra*, completely ignores the existence of these valid policies. By contrast, other circuit courts, including the Ninth Circuit in its opinion below have amply observed the foregoing policies and given them proper weight.[11] *Contractors, Laborers, Teamsters, and Engineers Health & Welfare Plan v. Associated Wrecking Co.*, 638 F.2d 1128 (8th Cir. 1981); *New Mexico District Council of Carpenters v. The Mayhew Co.*, 664 F.2d 215 (10th Cir. 1981); *Washington Area Carpenters' Welfare Fund et al. v. Overhead Door Co.*, 681 F.2d 1 (D.C.Cir. 1982).

The policies expressed in Sections 7, 8 and 9 of the Act in no way bear upon, let alone militate against, requiring a contractor to live up to its fringe benefit payment obligations to an innocent third party creditor beneficiary. Certainly, the employer commits no unfair labor practice under Section 8 of the Act by making such payments. The Section 7 rights of employees to join labor organizations or refuse to join them are also protected. The benefits offered by trust funds are available to all employees regardless of their union membership. In some cases, the employees will be keenly aware of and will rely upon the employer's obligation to make fringe benefit contributions on their behalf. In other cases, the employees will be oblivious of the employer's promise to make such fringe benefit contributions. In either case, the enforcement of the employer's obligation to contribute does no violence to the free choice of employees to join or not join labor organizations. The N.L.R.B. has never denied the lawfulness of Section 8(f) agreements nor has

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[11]The contractor signing a pre-hire agreement "buys" labor peace and a source of skilled labor to do his work. The contractor's secret intent to ignore the fringe benefit contribution obligations contained therein cannot be binding on these innocent third party beneficiaries.

it ever held that they in any way violate the Section 7 rights of employees. Indeed, since *Higdon*, the Board has continued to fashion national labor policy along the lines suggested herein. *International Union of Operating Engineers, Local 150*, 255 NLRB No. 83 (1981); *Albuquerque Insulation Contractor, Inc.*, 256 NLRB No. 15 (1981). Finally, upholding the court enforceability of pre-hire agreements does not encroach upon the exclusive jurisdiction of the Board to determine appropriate collective bargaining units and/or to certify or decertify labor organizations as the majority representative of the employees. Indeed, requiring a trust fund to prove majority status as a condition to suit injects the district courts into areas of the labor/management relationship which Congress has vested in the exclusive jurisdiction of the National Labor Relations Board. *Leedom v. Kyne*, 358 U.S. 184 (1958); *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers*, 425 U.S. 800 (1976); *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959); *Local No. 3-193, International Woodworkers of America v. Ketchikan Pulp Company*, 611 F.2d 1295 (9th Cir. 1980).

Under the rule advocated by Petitioner, the courts will now have to answer such questions as: What is the appropriate unit? Are certain employees excluded from the unit because they are supervisors? Is a single craft unit an appropriate unit for bargaining? Do the employees have a "community of interest"? Has the employer's conduct dissipated the union's majority status? These are all celarly Board questions within its special competence. Other issues before the district court will be: Does Board law apply or are the courts to fashion their own common law independent of the Board? If Board law applies, how will the courts reconcile Board cases that are in seeming conflict? *Cf. Dee Cee Floor Covering, Inc.*, 232 NLRB 421 and *Haberman*

Construction Company, 236 NLRB 79, *enforcement denied en banc*, 641 F.2d 351 (5th Cir. 1981). The Fifth Circuit in *Schafer*, *supra*, obviously failed to consider these important issues and the heavy burden its approach imposes on the district courts.

In sum, the policies of the Act as expressed in Sections 7, 8 and 9 will be bolstered by a rule upholding court enforceability without regard to belated claims of lack of majority status.

Conclusion.

The judgment of the Ninth Circuit should be affirmed.

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No. 81-2150

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JIM MCNEFF, INC.,
a California Corporation,

Petitioner,

vs.

FRANK L. TODD, et al.,

Respondents.

IN SUPPORT OF AFFIRMANCE

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF FOR LOYOLA OF LOS ANGELES LAW REVIEW AS AMICUS CURIAE

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BRIEF FOR LOYOLA OF LOS ANGELES LAW REVIEW AS AMICUS CURIAE

The Loyola of Los Angeles Law Review as amicus curiae respectfully submits this brief in support of Frank L. Todd, respondent. The Loyola Law Review urges this Court to affirm the decision of the

United States Court of Appeals for the Ninth Circuit in **Todd v. Jim McNeff, Inc.**, 667 F.2d 800 (9th Cir. 1982). Consent to the filing of this Brief has been received from counsel for both the petitioner and the respondent and has been filed with the Clerk of this Court.

STATEMENT OF INTEREST

The Loyola of Los Angeles Law Review's interest in filing this brief lies in encouraging students as well as members of the bar to contribute in the development of labor relations and employment law.

Todd v. Jim McNeff, Inc., came to the Law Review's attention as part of the Law Review's annual Ninth Circuit Labor Law Survey. The split among the circuits on section 8(f) prehire agreement

enforceability brought to light in the **McNeff** decision sparked the Law Review's desire to express itself on the issue. This brief provides the opportunity for that expression.

SUMMARY OF THE ARGUMENT

Prehire agreement wage and benefit provisions need to be enforced: a construction industry employer must know his labor costs; an employee must know his basic terms of employment. Once signed, prehire agreement wage and benefit terms should be enforced until NLRB election result certification.

The filing of a section 9(c) or (e) representation petition should not by itself disrupt the enforceability of prehire wage and benefit terms.

The courts provide the proper enforcement forum.

ARGUMENT

I. SECTION 8(f) PREHIRE AGREEMENT WAGE AND BENEFIT TERMS ARE ENFORCEABLE FROM AGREEMENT INCEPTION UNTIL NLRB ELECTION RESULT CERTIFICATION.

A. Section 8(f) Legislative History Calls for Enforceable Wage and Benefit Provisions.

Wage and benefit provisions are fundamental to the employment relationship. See **Curtiss-Wright Corp. v. NLRB**, 347 F.2d 61, 69 (3d Cir. 1965). In the construction industry, reaching early agreement on wage and benefit terms is of particular importance. Moreover, the construction industry employer needs to know his labor costs before he can bid accurately. Congress recognized the

particular concerns of the construction industry when it authorized prehire agreements:

> "One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral."
>
> Senate Comm. on Labor and Public Welfare, Labor-Management Reporting and Disclosure Act of 1959, Sen. Rep. No. 187, 86th Cong., 1st Sess. 28 (hereinafter cited as "Sen. Rep."), reprinted in 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 424 (1959) (hereinafter cited as "Leg. Hist."); see **NLRB v. Iron Workers**, 434 U.S. 335, 348 (1978).

Thus, prehire agreements were permitted in order to facilitate accurate bidding practices by employers and a ready access to union hiring halls. If

prehire agreements were to be held unenforceable ab initio, then neither of the two legislative goals would be met. The union could unilaterally cut off access to hiring halls and wage costs could fluctuate resulting in inaccurate bids.

Without the enforcement of wage and benefit terms of a prehire agreement, construction industry employees cannot know from one day to the next what they will be paid or to what benefits they are entitled. Section 8(f) allows a union and employer to reach agreement on wage and benefit terms essential to the bargaining relationship. 29 U.S.C. §158(f) (1976). The congressional policy underlying section 8(f) supports the enforceability of those terms.

B. Iron Workers Supports Judicial Enforceability of Prehire Wage and Benefit Terms.

The Court, in **NLRB v. Iron Workers**, 434 U.S. 335 (1978), described the prehire contract as "'a preliminary step that contemplates further action for the development of a full bargaining relationship.'" 434 U.S. at 345 (quoting **Ruttmann Construction Co.**, 191 N.L.R.B. 701, 702 (1971)). The Court noted that "when the union successfully seeks majority support the prehire agreement attains the status of a collective bargaining agreement executed by the employer with a union representing a majority of the employees in the unit." Id. at 350.

The singular nature of the construction industry was addressed by Congress:

> "The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various states of construction."
>
> Sen. Rep. at 27, reprinted in 1959 U.S. Code Cong. & Ad. News, pp. 2318, 2344, and in Leg. Hist. at 423.

Thus, "[r]epresentation elections in a large segment of the industry are not feasible to demonstrate . . . majority status due to the short periods of actual employment by specific employers." 434 U.S. at 349 (quoting Leg. Hist. at 541-42). Accordingly, some consideration should be given to the stability of wage and benefit rights of the employees in the prehire agreement context.

The ability to enter into a voluntary prehire agreement with an employer does not grant the union the privileges of a majority representative. 434 U.S. at 352. A prehire agreement does not attain the status of a collective bargaining agreement subject to 29 U.S.C. §158(d) (1976) until the union demonstrates majority status. Id. at 349-50. Thus, a prehire agreement is something less than a collective bargaining agreement enforceable through the unfair labor procedures. Id. A prehire agreement is, however, something more than a nullity; it represents a voluntary contract whereby both parties obtain both the benefits and burdens of the limited relationship created under section 8(f) of the statute.

Iron Workers held that picketing to enforce a prehire contract violates section 8(b)(7). Id. at 352. Section 8(b)(7) prohibits picketing to force an employer "to recognize or bargain with a labor organization as the representative of his employees." 29 U.S.C. §158(b)(7). Concerned with the employees' freedom to choose their bargaining representative, the Court emphasized the voluntary nature of section 8(f) contracts: "Congress was careful to make its intention clear that prehire agreements were to be arrived at voluntarily. . . ." 434 U.S. at 348 n.10. **Iron Workers** does not address the situation where no picketing occurs and the parties voluntarily agree to honor wage and benefit provisions.

Iron Workers prohibits picketing to enforce prehire contracts. **Iron Workers**

does not prohibit the enforcement of prehire agreements which were voluntarily agreed upon by the union and the employer. Accordingly, it is appropriate to consider those aspects of the employment relationship which best meet the underlying purposes of section 8(f) and enforce those provisions.

C. A Section 9 Election Petition Should Not Disrupt Prehire Agreement Wage and Benefit Enforceability.

Ordinarily, a current collective bargaining agreement acts as a bar to any challenge regarding the majority status of a union. **Pioneer Inn Associates v. NLRB**, 578 F.2d 835 (9th Cir. 1978). Under section 8(f), however, a

union's majority status may be called into question at any time:

> "[A]ny agreement which would be invalid but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title."
>
> 29 U.S.C. §158(f).

Section 8(f), however, is limited by its language to permitting a challenge to a union's majority status through the filing of a representation petition with the Board.

A finding that the filing of a section 9 petition renders a prehire contract unenforceable would create a period between election petition filing and NLRB election certification during which the parties to the agreement could not rely on bargained for wage and benefit terms. The effect of this would be that

employees would not be assured of agreed upon wages; employers could not rely on access to union hiring halls; employees would not be assured of medical and other benefit coverage; and employee trusts would not know whether to provide employee benefit coverage. Such a hiatus could create labor instability and jobsite unrest. See **Connell Construction Co. v. Plumbers and Steamfitters**, 421 U.S. 616, 630 (1975).

In **Frank Bros. Co. v. NLRB**, 321 U.S. 702 (1944), the Court upheld a NLRB order requiring an employer to bargain with a union which had lost majority support during a seven-month interval between the union's filing of unfair labor practice charges and the Board's issuance of a complaint based on those charges. The Court refused to allow the

employer to disregard its bargaining commitment during the seven-month interval even though the union had lost employee support. The Court noted that:

> [R]efusal of an employer to bargain collectively . . . disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions."
>
> * * *
>
> "[A] bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed."

Id. at 704-05.

The Court in **Brooks v. NLRB**, 348 U.S. 96 (1954), held that an employer's belief that his employees had deserted their certified union did not justify the employer's refusal to bargain with the union. As in **Frank Bros.**, the Court found the employer's duty to bargain

with the union continued at least until Board review:

> "If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief, while continuing to bargain in good faith at least until the Board has given some indication that his claim has merit."
>
> Id. at 103.

The Court noted that to allow an employer to refuse to bargain because an employer questions a union's majority status would undercut the "underlying purpose [of] . . . industrial peace." Id.

Frank Bros. and **Brooks** support uninterrupted enforceability of prehire wage and benefit provisions. The Court in these cases recognized the importance of stability in labor relations. A prehire contract provides such stability in the

construction industry. The filing of a section 9(c) or (e) representation petition requests an election. Enforcement should continue until that election is held.

Should this Court determine that a more definite time period for enforcement of a prehire agreement is desirable, 29 U.S.C. §158(d)(4) provides an alternative.

Although a Board election is readily available under section 8(f) through the procedures set forth in sections 9(c) and (e), if no election petition is filed, a prehire agreement could be voluntarily enforced by an employer and a minority union indefinitely. **Trust Fund v. McDowell**, 103 LRRM 2219 (1979), illustrates this problem. In **McDowell**, the employer paid benefits to the union

trust funds pursuant to the provisions of a minority prehire agreement for almost ten years. Id. at 2220. The employer repudiated the agreement and it was held to be unenforceable. Id.

Although Congress intended prehire agreements to apply to the short term employment situation in the construction industry, nevertheless, there should be some mechanism that would permit stability if all parties to the agreement (employees, the union, and the employer) so desired, and that would provide a structured termination procedure should any of the affected parties become disenchanted with the provisions of the prehire agreement or representation by the particular signatory union.

Section 158(d)(4) imposes a sixty day notice period to terminate or modify a

collective bargaining agreement during which time the agreement "continues in full force and effect." 29 U.S.C. §158 (d)(4). In **Eastern District Council v. Blake Construction Co.**, 457 F.Supp. 825 (E.D. Va. 1978), the district court held that a prehire contract did not terminate until sixty days following notice of intent to terminate. The court reasoned:

> "Borrowing from the notice provision of §8(d) of the Labor Act, the contract was terminated at the conclusion of the sixtieth day following that date [of termination], through which time damages continued to accrue."

Id. at 831.

The **Blake** court applied the sixty day notice provision to all collective bargaining agreements, regardless of their method of creation. Id. at 829. Under **Blake**, the union's majority status can

be raised at any time by the filing of a representation petition under section 9(c) or (e) of the statute. The effect of the election petition would be to start the section 158(d) sixty day time period. The prehire agreement would continue in full force for up to sixty days. The parties to the agreement would be assured of constant wage and benefit enforceability for at least sixty days, during which time an election could be held. Because final decisions on representation petitions are usually made by the Board within sixty days of the petition filing date, a hiatus would likely not occur. 45th Annual Rep. of NLRB for Fiscal Year 1980, page 15, Chart No. 10 (e.g., mean time for final decisions from date of petition in 1980 was thirty-eight days).

The benefit of adopting the sixty day enforcement period under section 158(d) would be to assure employees of wage and benefit provisions called for under the agreement, the union would have the obligation to pursue majority status in a timely fashion for those sites which remain under construction for a sufficiently long time to permit representation proceedings, and the employer would enjoy stable labor costs and continued access to a skilled labor force.

II. COURT ENFORCEMENT OF PREHIRE WAGE AND BENEFIT TERMS IS PROPER.

A. Section 301 Authorizes Judicial Enforcement of Prehire Wage and Benefit Terms.

Section 301(a) gives federal courts jurisdiction over suits "for violation

of contracts between an employer and a labor organization representating employees in an industry affecting commerce. . . ." 29 U.S.C. §185(a) (1978). This Court in **Retail Clerks v. Lion Dry Goods**, 369 U.S. 17 (1962), held that section 8(f) contracts fall within section 301's language.

Since the Court's decision in **Textile Workers v. Lincoln Mills**, 353 U.S. 448 (1957), it has been settled that section 301 does more than confer jurisdiction:

> "[I]t authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements. . . ."
>
> **Lincoln Mills** at 451.

Lincoln Mills instructs the federal courts to fashion enforcement "from the policy of our national labor law." Id. at 456. The Court recognized that while

the Labor Management Relations Act provides federal courts with some substantive law, not all statutory mandates offer substantive guidance. Id. Federal courts can nevertheless provide for enforcement:

> "Some [statutory mandates] will lack express statutory sanctions but be solved by looking at the policy of the legislature and fashioning a remedy that will effectuate that policy."
>
> Id. at 457.
>
> * * *
>
> "[I]t is far too late in the day to deny that Congress intended the federal courts to enjoy wide-ranging authority to enforce labor contracts under §301."
>
> **Plumbers & Pipefitters v. Plumbers and Pipefitters, Local 334,** 452 U.S. 615, 627 (1981).

Section 8(f) legislative policy calls for prehire wage and benefit provisions which are binding until NLRB election

certification and which are enforceable in the federal courts. **Lions Dry Goods** gives the courts jurisdiction to resolve section 8(f) disputes. **Lincoln Mills** gives the courts the power to order section 8(f) agreement enforcement.

CONCLUSION

Section 8(f)'s express language only authorizes prehire agreements. Section 8(f) legislative history, however, suggests that Congress passed it with enforceability in mind. Congress left the substance of enforcement to the federal courts.

A prehire agreement is not a complete collective-bargaining agreement; it becomes complete when the union attains majority status. A prehire agreement, however, should have enforceable wage

and benefit provisions. All prehire terms may not be enforceable because the prehire contract is a collective bargaining agreement of limited duration, entered into without benefit of union majority status. Yet fairness demands that the agreement should have force. Enforcement of the wage and benefit provisions of a prehire agreement until NLRB election result certification strikes an appropriate balance of interests between the parties and is within the congressional intent behind section 8(f).

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2150

JIM MCNEFF, INC., a California corporation,
Petitioner,

v.

FRANK L. TODD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF RESPONDENTS

The National Coordinating Committee for Multiemployer Plans submits this brief *amicus curiae* in support of Respondents. Copies of letters written by counsel for Petitioner and Respondents granting the parties' consent to this submission are on file with the Clerk of the Court.

INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The National Coordinating Committee for Multiemployer Plans (the "NCCMP") is a non-profit, tax-exempt organization established after Congress enacted the Employee Retirement Income Security Act of 1974 ("ERISA").[1] NCCMP consists of representatives of approximately one hundred thirty-five pension and welfare

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[1] 88 Stat. 829, *et seq.*

plans, or their sponsors, through which the interests of approximately three million persons are represented. The majority of the NCCMP's affiliates operate in the building and construction industry, and include plans covering employees in virtually all of the building and construction trades. Because of the broad range of experience of the NCCMP's constituent organizations and its close, on-going contacts with the hundreds of trustees charged with operating those plans, the NCCMP believes that it is uniquely qualified to state the position of the participants and beneficiaries of such plans.

During the thirty-five years since Congress authorized the formation of jointly-trusteed employee benefit plans, such plans have become permanent, indispensable components of significant sectors of the economy where the work forces bargain collectively. At the very heart of this benefit trust fund structure, as required by Section 302(c)(5) of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 186(c)(5), is the collective bargaining process. Through that process employers enter into binding commitments with the labor organizations representing their employees to make periodic payments, at specified rates, for the duration of specified terms, to the fund trustees whose exclusive responsibility it is to administer those funds for the benefit of the employees of those employers. The trustees, in turn, being assured of receiving income to the trust in the amounts, and for the terms, specified in collective bargaining agreements, are able to design program of benefits, and to offer to the employees whose labors generate the trust income the assurance that the benefits will be available, for those with sufficient covered service to qualify, when they are needed.

This entire system, extending throughout the nation to millions of employees and their families, is absolutely dependent for its vitality on stable, secure and enforceable contractual commitments by employers to make, in a timely fashion, agreed-upon benefit trust fund contribu-

tions for the agreed-upon term of any contract. Examination of the "comprehensive and reticulated" regulatory scheme set forth in ERISA, *Nachman v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980), makes abundantly clear the Congressional assumption that enforceable collective bargaining agreements requiring employer contributions are the essential ingredient upon which the entire system depends.

ERISA imposes on fund trustees the obligation to comply with detailed minimum standards governing participation, funding, vesting, and reporting and disclosure, and with stringent standards of fiduciary responsibility for providing employee benefit trusts with the income they require. Congress took this approach in 1974 on the understanding that the required system of financing these trusts through collective bargaining was already in place. This is made clear by examining certain of the definitional and substantive requirements imposed by ERISA. Thus, for example, a "multiemployer plan" is, by definition, one "to which more than one employer *is required* to contribute" (emphasis added).[2] This definition is further elaborated in regulations issued by the Internal Revenue Service. No multiemployer plan is deemed to exist in the absence of "a legally enforceable agreement to establish such a plan signed by the employer," in which legally enforceable agreement "[t]he employer contributions to be made to the plan are set forth. . . ."[3]

The statutory obligations on plan trustees, with regard both to participants and beneficiaries and to contributing employers, also rest on the understanding that the

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[2] ERISA § 3(37)(A), as amended, 29 U.S.C. § 1002(37)(A). The same requirement was contained in ERISA as enacted in 1974.

[3] 26 C.F.R. § 1.410(a)-2(i)(2); 26 C.F.R. § 1.411(a)-2(c)(2); *see also* 26 C.F.R. § 1-414(f)(1) defining a multiemployer plan as one in which "[m]ore than one employer *is required* by the plan instrument or other agreement to contribute (or to have contributions made on its behalf) to the plan. . ." (emphasis added).

contractual arrangements binding employers to the plans are enforceable. Thus, under ERISA, trustees are obligated to grant credit to participating employees, for participation, vesting, and benefit accrual purposes, for each hour in a participating employer's service for which the employee is paid, or is entitled to be paid, by the employer.[4] Employees are, moreover, entitled to receive credit for all such hours of service regardless of whether or not their employers have, in fact, paid the contributions required of them.

> Whether payments to the trust have or have not been made by the employer is not relevant in the determination as to whether an employee qualifies.
>
> [*Central States, Southeast and Southwest Areas Pension Fund v. Hitchings Trucking Co.*, 472 F. Supp. 1243, 1247 (E.D. Mich. 1979); *accord*: *Central States, Southeast and Southwest Areas Pension Funds v. McNamara Motor Express, Inc.*, 503 F. Supp. 96 (W.D. Mich. 1980); *Central States Fund v. Central Transport*, —— F. Supp. ——, 2 EBC 1844 (E.D. Mich 1981).]
>
> [C]redit must be given solely on the basis of service performed for a participating employer, regardless whether that employer is required to contribute for such service or has made or defaulted on his required contributions.
>
> [Advisory Opinion Letter 76-89 issued by the Department of Labor on August 31, 1976, reprinted in 221 BNA Pension Reporter R-24.]

Trustees' obligations under ERISA vis-a-vis participating employers are equally clear. When any employer participating in a plan fails to make the contribution payments called for in its contract, in full and on time, that plan's trustees are obliged to make

> such reasonable, diligent and systematic efforts as are appropriate under the circumstances

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[4] ERISA §§ 202, 203 and 204, 29 U.S.C. §§ 1052, 1053, and 1054; 29 C.F.R. § 2530.200b-2.

to collect for the trust those delinquent contributions. Prohibited Transaction Exemption 76-1 issued by the Department of Labor on March 26, 1976, reprinted in 79 BNA Pension Reporter R-5. When necessary to collect those delinquencies, moreover, the trustees' fiduciary responsibility under ERISA requires them to sue delinquent employers to enforce the trusts' right to receive the promised contributions. *See, e.g., Rosen v. Hotel and Restaurant Employees Pension Fund*, 637 F.2d 592 (3rd Cir. 1981), *cert. denied*, 50 L.W. 3278 (1982). *See also* Advisory Opinion Letter 78-28 issued by the Department of Labor on December 5, 1978, reprinted in 221 BNA Pension Reporter R-25.

Petitioner now urges the Court to rule that, with respect to agreements entered into under Section 8(f) of the National Labor Relations Act,[5] no such enforceable contractual arrangement is possible. If petitioner is correct, § 8(f) contracts are not "contracts" at all.[6] And if petitioner is correct, the entire pension benefit system in the construction industry is undermined. For in the absence of an *enforceable* agreement binding an employer to a fund, the employer's participation in the fund is not secured; its contributions (if any) to the fund are unlawful;[7] and its employees' service under the § 8(f) agreement need not—indeed, may not—be credited by the trustees.

The grave problems which petitioner's formulation would cause such funds would, of course, be greatly compounded if, as petitioner suggests, § 8(f) agreements have no binding effect when they are signed, but can be

[5] 29 U.S.C. § 158(f).

[6] "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts, § 1.

[7] *See* § 302(a) and (c)(5) of the LMRA, 29 U.S.C. § 186(a) and (c)(5).

transformed, by the occurrence over time of events of which the trustees have no notice, into fully enforceable collective bargaining agreements. Given the scope and variety of those trustee obligations which arise when, and *only when*, an employer becomes contractually bound to participate in a plan (see pp. 3-5 *supra*), fulfillment of those obligations under § 8(f) contracts, construed as petitioner urges, would plainly be a practical impossibility. There simply is no feasible way for plan trustees to determine, on a contract-by-contract, job-by-job basis when majority status has been successfully attained, triggering the employer's obligation to contribute, the trustees' duty to enforce that obligation, and the employees' right to receive service credit under the plan.

It is, we believe, clear that precisely because of these dangers to construction industry pension plans, Congress enacted § 306(a) of the Multiemployer Pension Plan Amendments Act of 1980 [8] ("MPPAA") to assure that the promises in collectively bargained agreements, including those signed under § 8(f), are enforceable according to their terms.

SUMMARY OF ARGUMENT

Petitioner McNeff, Inc. argues here that the collective bargaining agreement it entered into with Local 12 of the International Union of Operating Engineers, and under which it agreed to make regular contribution payments to the respondent employee benefit trusts, is not enforceable by those trusts because it was a § 8(f) agreement, and because the trusts did not prove that Local 12 had enjoyed majority status during the period for which contributions were sought.

McNeff, Inc. thus invites the Court to ignore the long history of collective bargaining under the sanction of §8(f) which has developed in the construction industry, and the correlative development of construction industry

[8] Pub. L. 96-364, 94 Stat. 1208, *et seq.*

employee benefit plans which depend for their existence on the vitality of § 8(f) contracts.

That effort cannot succeed. Whatever ambiguities may have existed prior to 1980 regarding the intended scope and effect of employee benefit trusts' rights under § 8(f) contracts were unmistakeably eliminated by Congress' enactment of § 306(a) of MPPAA. Based upon its findings that the remedies previously available to benefit plan trustees for enforcing those plans' rights against contributing employers were inadequate in light of the clear public policy mandate that such be strengthened, Congress provided a clear and unambiguous federal law remedy designed to make trustees' collection actions like the one at bar simple, efficient, and effective, and to discourage employers like McNeff, Inc., who sign agreements requiring the payment of contributions to employee benefit funds, from flouting those contractual obligations.

Nor can there be any doubt that the Congressional purpose of precluding employers from asserting "extraneous" defenses in collection actions brought under § 306(a) was intended to encompass the very defense raised in this case by McNeff, Inc. Indeed, the evidence cited in the legislative history of MPPAA to demonstrate the need for provision of a more effective collection remedy included two earlier court decisions in which the same defense had been successfully asserted by a delinquent contributing employer. Congress made clear that, in its legislative judgment, those cases incorrectly applied the law, and undertook in § 306(a) to assure that those judicial errors would not be repeated.

The policy considerations which Congress believed made MPPAA necessary, moreover, are consonant with, and fortified by, the more general policy, most recently reaffirmed by this court in *Kaiser Steel Corp. v. Mullins*, —— U.S. ——, 50 L.W. 4152 (January 13, 1982), that except where a contract purports to require conduct which is itself unlawful, the courts must not permit a contracting party to enjoy the fruits of his bargain without pay-

ing the agreed-upon price for those benefits. Because that is precisely what McNeff, Inc. attempts to do here, and because both the Congress and this Court have made clear that McNeff, Inc. is not entitled to any such windfall, the decision of the Court of Appeals should be affirmed.

ARGUMENT

IN ENACTING § 306(a) OF THE 1980 MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT CONGRESS REAFFIRMED ITS DETERMINATION TO PRECLUDE THE DEFENSE THAT THE UNDERLYING AGREEMENT IS ONE PERMITTED BY § 8(f) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, AND THAT THE UNION SIGNATORY LACKS MAJORITY STATUS.

In this suit brought by the Trusts[9] to collect fringe benefit contributions, it is undisputed that McNeff, Inc. was a signatory to a collectively bargained agreement[10] whose terms provided for the payment of such contributions for the employment by McNeff of operating engineers beginning on and after September 13, 1978, the date the agreement was executed, that McNeff never made the payments required by that agreement, and that McNeff did not, prior to May 22, 1979, when the Company filed a petition for a National Labor Relations Board representation election, take any action to abrogate or cancel the agreement. McNeff's primary defense here is that the Trusts are required to prove not only the existence and terms of the agreement and the employment of the type covered by the agreement but also that Local 12 IUOE, "the

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[9] The Operating Engineers Health & Welfare Fund, the Operating Engineers Pension Trust, the Operating Engineers Vacation-Holiday Savings Trust and the Operating Engineers Training Trust.

[10] An agreement entered into pursuant to § 8(f) of the National Labor Relations Act is a collective bargaining agreement. *Woelke & Romero Framing, Inc. v. NLRB*, —— U.S. ——, 50 L.W. 4538, 4543 (1982).

union signatory to the agreement [was, during the period September 13, 1978-May 22, 1979,] the majority representative of the employer's employees" (Pet. Br. i). As we now show, a central purpose of § 306(a) of MPPAA is to make it plain that employers such as McNeff, Inc. have no such defense to a fringe benefit collection action arising under a § 8(f) agreement.

A. Section 306(a) Of MPPAA Applies To This Case

The collective bargaining agreement here was, as we have noted, executed on September 13, 1978, this collection suit was brought on April 29, 1979, MPPAA was signed into law on September 26, 1980, and this Court in *Kaiser Steel Corp. v. Mullins*, *supra*, 50 L.W. at 4156, left open the question of whether § 306(a) of MPPAA is to be given only prospective effect. We therefore begin by demonstrating that § 306(a) does apply to this case.[11]

The governing principle is "that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974). The opinion in *Bradley* traced the origin and the justification for this rule to Chief Justice Marshall's words in *United States v. The Schooner Peggy*, 1 Cranch 103, 110 (1801). *See* 416 U.S. at 711-712. The *Bradley* Court noted that *The Schooner Peggy* left it "unclear whether a change in the law occurring while a case was pending on appeal was to be given effect only where, by its terms, the law was to apply to pending cases, as was true of the convention under consideration in *The Schooner Peggy*, or, conversely, whether such a change in the law must be given effect *unless* there was clear indication that it was *not* to apply in pending cases." 416

[11] It is the NCCMP's position that the rejection of the McNeff, Inc. defense as dictated by MPPAA is consistent with preexisting law and that, as its sponsors stated, MPPAA § 306(a) clarifies that preexisting law, but that in any event MPPAA § 306(a) governs.

U.S. at 712-713 (emphasis in original). The Court observed further that "in *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268 (1969), the broader reading of *The Schooner Peggy* was adopted, and this Court ruled that 'an appellate court must apply the law in effect at the time it renders its decision.' *Id.* at 281." 416 U.S. at 714. Moreover, after describing *Thorpe*, the *Bradley* Court said that case "thus stands for the proposition that even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." 416 U.S. at 715.

Accordingly, *Bradley* "reject[ed] the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature." *Id.* Rather, the party which would give the legislation only prospective effect has the burden of establishing that this was the legislative intent. A reading of the legislative history of § 306(a) of MPPAA reveals no evidence whatsoever of an intent to provide only for a prospective effect. Moreover, as we develop at pp. 21-25, *infra*, the evidence in this instance precludes such a limited reading; sponsors of the amendment explained that "the bill clarifies the law" as opposed to changing the law, and the sponsors' overriding concern was to further the financial stability of employee benefit funds, a result best achieved by applying MPPAA to pending cases.

To be sure, "exceptions to the general rule that a court is to apply a law in effect at the time it renders its decision 'ha[ve] been made to prevent manifest injustice,'" *Bradley, supra*, 416 U.S. at 716-717. But an employer who has executed a collective bargaining agreement and then decides to ignore the promise contained in that agreement cannot invoke the "manifest injustice" exception. The equities in this situation are clearly on the side of the Trusts which, under the agreement, are entitled to receive fringe benefit contributions, and their beneficiaries. No breaching employer ought to be heard to

assert that in entering into the collective bargaining agreement, and in obtaining the labor contracted for pursuant to the agreement, the employer did not intend to and should not be required to make the promised contribution.

B. One Of Congress' Central Purposes In Enacting § 306(a) Of MPPAA Was To Deny Employers The Precise Defense At Issue In This Case

1. Section 306(a) of MPPAA added a § 515 to ERISA, 29 U.S.C. § 1145, which provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.[12]

These bare words alone indicate that Congress' intent was to require strict observance of the "*terms* of a collectively bargained agreement" where those terms provide that the "employer * * * is obligated to make contributions to a multiemployer plan" unless observing the terms of the agreement is "inconsistent with law." Prior to enactment of § 306(a) it was well-settled that an employer who breaches a collective bargaining agreement providing for fringe benefit payments is subject to suit for breach of contract under § 301 of the LMRA, 29 U.S.C. § 185. *See, e.g., Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960). Even if the legislative record were otherwise silent, the fact that Congress chose to enact yet a second federal law providing for the enactment of the duty to make such payments clearly demonstrates

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[12] Section 306(b) of MPPAA, 94 Stat. 1295, added a § 502(g)(2), 29 U.S.C. § 1132(g)(2), to ERISA which provides a clear statutory right of action to enforce § 515, as well as for mandatory awards of interest, liquidated damages, and attorneys' fees against delinquent employers.

that § 306(a)'s purpose is to insure that such agreements are enforceable according to their terms, where those terms are not inconsistent with law, thus limiting the signatory employers' defenses and simplifying and expediting collection actions.

What the language of § 306(a) suggests its authoritative explanation confirms.

ERISA is a "comprehensive and reticulated statute" enacted in 1974 to protect the benefit expectations of participants and beneficiaries of private pension and welfare plans, including multiemployer plans. *Alessi v. Raybestos-Manhattan Inc.*, 451 U.S. 504, 510 (1981), *quoting*, *Nachman Corp. v. PBGC*, *supra*, 446 U.S. at 361.[13] Finding that the private employee benefit plan system is "affected with a national public interest" in providing for the "well-being and security of millions of employees and their dependents," 29 U.S.C. § 1001(a), Congress declared the regulation of private employee benefit plans to be exclusively a federal concern. *Alessi*, *supra*, 451 U.S. at 523.

The MPPAA amendments to ERISA were prompted by Congressional anxiety about the financial stability of multiemployer pension plans and concern that the maintenance and growth of such plans was being discouraged. *See* MPPAA § 3, 29 U.S.C. § 1001a. *See generally* Report of the House of Representatives Committee on Education and Labor on H.R. 3904, H.Rep. No. 96-869 (Part I), 96th Cong., 2d Sess. (April 2, 1980). Congress recognized that millions of retirees and employees are dependent on multiemployer plans for their retirement in-

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[13] ERISA generally establishes certain reporting and disclosure requirements, sets minimum standards for participation, vesting, benefit accrual, plan funding, and plan fiduciary conduct, provides for civil and criminal enforcement of the Act, and creates a termination insurance program to protect plan participants against loss of certain benefits upon plan termination. *See* 29 U.S.C. § 1001, *et seq.* *See generally Nachman*, *supra*.

come security, and sought by enacting MPPAA to enhance the financial soundness of such plans and to foster their maintenance and growth. *Id. See also NLRB v. Amax Coal Co.*, 453 U.S. 322, at 338 n.22.[14]

MPPAA is the product of S. 1076, 96th Cong., 1st Sess. (1979) and H.R. 3904, 96th Cong., 1st Sess. (1979) which were introduced in Congress as companion bills during May 1979. Neither bill contained any provision relating to delinquent contributions. At that time, the focus of the legislation was the imposition of stricter funding requirements and of an obligation (described as "withdrawal liability") on employers who withdraw from participation in such plans to continue making payments to the plans after their withdrawal until such time as they have funded an aliquot share of the plans' unfunded pension liabilities. *See* MPPAA § 104(2), 29 U.S.C. §§ 1381-1405.[15]

The bills did not progress very far through the legislative process, however, before it became apparent to Con-

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[14] Towards this end, in addition to addressing the problem of delinquent employer contributions, MPPAA generally requires plans to fund their benefit liabilities over a shorter period of time (MPPAA § 304(b), 29 U.S.C. § 1082(b)), provides for plan reorganization and increased funding in times of financial difficulty (MPPAA § 104(2), 29 U.S.C. §§ 1421-1424), authorizes the Pension Benefit Guaranty Corporation to provide financial assistance to struggling plans (MPPAA § 104(2), 29 U.S.C. § 1431), imposes withdrawal liability on employers which cease contributing to plans (MPPAA § 104(2), 29 U.S.C. §§ 1381-1405), and amends the benefits guaranty program to make plan insolvency rather than termination the event that triggers the guaranty (MPPAA § 102, 29 U.S.C. § 1322(a)), to reduce guaranty levels (*id.*) and to increase plan insurance premiums (MPPAA § 105, 29 U.S.C. § 1306).

[15] Congress found that "withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations. . . ." MPPAA § 3(a)(3), 29 U.S.C. § 1001a(a)(3). *See generally* H.Rep. No. 96-869 (Part I).

gress that the financial instability of multiemployer plans was attributable in substantial part to the failure of employers to make full and timely contributions to such plans. The Senate Labor and Human Resources Committee, the first Senate committee to consider S.1076, amended the bill to include a provision which eventually became § 306 of MPPAA.[16] *See* S.1076, § 308, Staff of the Senate Committee on Labor and Human Resources, S.1076: the Multiemployer Pension Plan Amendments Act of 1980, 96th Cong., 2d Sess. 242-243 (unnumbered Committee Print, April 1980).[17] The purpose of this

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[16] Section 308(a) of the Labor Committee bill would have added the following as § 515 to ERISA:

> Every employer who is obligated under the terms of a collectively bargained multiemployer plan (or under the terms of a collective bargaining agreement related to the plan) shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Section 308(b) would have added the following § 502(g)(2) to ERISA providing for recovery of interest, liquidated damages, and attorneys fees in contribution collection suits:

> In any action under this title by a fiduciary for or on benalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan the unpaid contributions, interest on the unpaid contributions, an additional amount equal to interest on the contributions as liquidated damages, a reasonable attorney's fee and costs of the action, to be paid by the defendant, as well as such other legal or equitable relief as the court deems appropriate. For purposes of this paragraph, interest on unpaid contributions is determined using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1954, as amended.

This latter language, with minor modifications accommodating a similar provision in the House-passed bill, became § 306(b) of MPPAA.

[17] Because S.1076 was also referred to the Senate Committee on Finance, no formal report was issued by the Labor and Human Resources Committee as Senate rules require a joint report under such circumstances. *Central States Pension Fund v. Alco Express Co.*, 522 F.Supp. 919, 928 n.11 (E.D.Mich. 1981).

delinquent contributions provision was explained in the following terms:

> Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans. Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys' fees and other legal costs arise in connection with collection efforts.
>
> These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability of the plan and thereby increase the potential withdrawal liability for all employers.
>
> *Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly.* Some simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plan's entitlement to the contributions. This should not be the case. *Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously. Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.*
>
> *The public policy of this legislation to foster the preservation of the private multiemployer plan*

> *system mandates that provision be made to discourage delinquencies and simplify delinquency collection.* The bill imposes a Federal statutory duty to contribute on employers that are already contractually obligated to make contributions to multiemployer plans. A plan sponsor that prevails in any action to collect delinquent contributions will be entitled to recover the delinquent contributions, court costs, attorney's fees, and double interest on the contributions owed. The intent of this section is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies.
>
> [*Id.* at 243-44 (emphasis added).] [18]

In the House, the Ways and Means Committee took up consideration of H.R.3904 after that bill had been favorably reported by the House Education and Labor Committee without any provision on delinquent contributions. The Ways and Means Committee amended the House bill to provide for the assessment of attorneys' fees and liquidated damages in an action to collect delinquent employer contributions as well as in an action to collect employer withdrawal liability. *See* H.Rep. No. 96-869 (Part II), 96th Cong., 2d Sess. 48-49, 89 (1980).[19] The Ways and

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[18] This was not the first time that the Senate Labor Committee had considered the serious financial impact of employer delinquencies on multiemployer plans. *See generally Alco Express Co., supra,* 522 F. Supp at 926 n.8.

[19] That provision would have added a § 502(1) to ERISA providing as follows:

> In any civil action against any person to collect delinquent contributions to or under a multiemployer plan, if the plan so provides the court may award the plantiff—
>
> (1) a reasonable attorney's fee and costs of action, and
>
> (2) liquidated damages (not in excess of 20 percent of the delinquency as determined by the court).
>
> Nothing in the preceding sentence shall be construed to limit any remedy permitted under any other provision of Federal or State law.

Means delinquency provision was included in the version of H.R.3904 unanimously passed by the House of Representatives on May 22, 1980. *See* 126 Cong. Rec. H4113-4171 (daily ed., May 22, 1980).

Following House passage of H.R.3904, the Senate Committees on Finance and on Labor and Human Resources jointly reported a version of S.1076 which reflected many of the amendments made to H.R.3904 during consideration of that bill in the House. *See* 126 Cong. Rec. S9833 (daily ed., July 24, 1980); 126 Cong. Rec. S10070 (daily ed., July 29, 1980). That joint Finance Committee-Labor Committee bill included a § 306 which amalgamated the delinquent contributions provisions of the House-passed bill and of the Senate Labor Committee bill.[20] *See* 126 Cong. Rec. S10094 (daily ed., July 29, 1980). Section 306 was included in the final Act without further change.

The decision to enact § 306(a) of the MPPAA as proposed by the Senate Labor Committee met with universal favor. We have not found a word in the legislative history contradicting or qualifying that Committee's explanation of the provision's overall purpose (and as we show at pp. 22-24, *infra*, the later elaborations on that statement by the legislation's sponsors reaffirm the points made by the Committee). The Senate Labor Committee's statement, we submit, corroborates what the decision to enact the section implies and what the words of § 306(a) say: that "the public policy of this legislation to foster the preservation of the private multiemployer plan system *mandates* that provision be made to discourage delinquencies and simplify delinquency collection" by providing a statutory duty—clarifying preexisting law—to make fringe benefit payments in accordance with the terms of a collectively bargained agreement providing for such payments and limiting the availability of certain

[20] The Senate Labor Committee provision was amended in this amalgamation process to incorporate the 20 percent limitation on liquidated damages contained in the House bill provision. Otherwise the Senate Labor Committee provision survived intact.

defenses. Indeed, given the then existing LMRA § 301 law that collective bargaining agreements are enforceable, unless MPPAA § 306(a) is read to simplify collection actions by assuring that the benefit payment promises in such agreements are enforceable according to their terms, so long as those terms are not unlawful, the provision is rendered of no purpose or effect.

2. McNeff, Inc. argues that the terms "obligated," "collectively bargained agreement" and "to the extent not inconsistent with law" used in § 306(a) are not plain and unambiguous, and that neither that provision nor the Senate Labor Committee explanation (quoted at pp. 15-16, *supra*) say in so many words that agreements entered into pursuant to the provisions in § 8(f) are collectively bargained agreements that obligate the signatory employer to make the payments as provided by the § 8(f) agreement's terms, or that enforceing the terms of a § 8(f) agreement is "consistent with law." The short but complete answer to this argument is that it was precisely such actions as this, involving § 8(f) agreements, that the sponsors of § 306(a) identified as demonstrating the need to which that section responds. On three different occasions the floor managers of MPPAA emphasized that § 306(a) was meant to preclude the delinquent employer from raising the "extraneous" defense of the union's claimed lack of majority status. The background that explains the felt need to address this point is easily stated.

In *NLRB v. Iron Workers*, 434 U.S. 335 (1978) (hereinafter *Iron Workers*), this Court had "concluded that the Board's construction of [§§ 8(b)(7)(C) and 8(f)] of the Act [at issue in that case] although perhaps not the only tenable one, is an acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory sections." *Id.* at 341. The Court described that position as follows:

> Under the Board's view of § 8(f), a prehire agreement does not entitle a minority union to be treated

> as the majority representative of the employees until and unless it attains majority support in the relevant unit. Until that time the prehire agreement is voidable and does not have the same stature as a collective bargaining contract entered into with a union actually representing a majority of the employees and recognized as such by the employer. Accordingly, the Board holds, as it did here, that picketing by a minority union to enforce a prehire agreement that the employer refuses to honor, effectively has the object of attaining recognition as the bargaining representative with majority support among the employees, and is consequently violative of § 8(b)(7)(C).
>
> [434 U.S. at 341.]

At the conclusion of its opinion, the *Iron Workers* Court noted that the "union argues that the Board's position permitting an employer to repudiate a prehire agreement until the union attains majority support renders the contract for all practical purposes unenforceable, assertedly contrary to this Court's decision in *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962)." 434 U.S. at 351. The Court responded to that argument as follows:

> There, the Court's opinion recognized that § 301 of the Labor Management Relations Act confers jurisdiction on the federal courts to entertain suits on contracts between an employer and a minority union, as well as those with majority designated collective-bargaining agents. Section 8(f) contracts were noted as being in this category. The Court was nevertheless speaking to an issue of jurisdiction. That a court has jurisdiction to consider a suit on a particular contract does not suggest that the contract is enforceable. It would not be inconsistent with *Lion Dry Goods* for a court to hold that the union's majority standing is subject to litigation in a § 301 suit to enforce a § 8(f) contract, just as it is in a § 8(a)(5) unfair labor practice proceeding, and that absent a showing that the union is the

majority's chosen instrument, the contract is unenforceable.

[434 U.S. at 351-352.]

Iron Workers was an unfair labor practice case involving picketing which the NLRB and the Court found to be recognitional (compare *International Union of Operating Engineers, Local 150*, 255 NLRB No. 83 (1981)), rather than a § 301 court case looking to payment according to the agreement's terms for labor performed. Accordingly the Court, having made it plain that *Lion Dry Goods* was not controlling, did not pursue the question of whether such a showing is to be required in any § 301 suit.

During the two years between the *Iron Workers* decision and Congress' consideration of the legislation that became MPPAA, a division of authority developed in the district courts on the question presented in this case. The argument for enforcement was described in *Washington, Etc. v. Overhead Door Co., Etc.*, 488 F.Supp. 816 (D.D.C. 1980), decided just three months before the Senate floor debate on MPPAA:

> Funds asserts that the *Iron Workers* case is limited to the situation of attempts to enforce prehire agreements by picketing. This interpretation was espoused in *Eastern District Council v. Blake Construction Co.*, 457 F.Supp. 825 (E.D.Va. 1978). The court in that case held that a pre-hire agreement, although terminable by either party at will, was enforceable, and was not in fact terminated until the employer gave reasonable notice of his intent to terminate. The employer's failure to comply with the agreement was held to constitute conduct manifesting such intent. *Id.* at 830. The court distinguished *Iron Workers*: ". . . that case dealt with the question of whether certain picketing was an unlawful labor practice and is not determinative on the facts of this case." *Id.* at 829. Relying on *Blake*, Funds argue that since Overhead has not manifested its intent to withdraw from the contract or shown that the union lacks majority support, but has signed subsequent

> agreements renewing the original one, it remains obligated to make contributions.
>
> [488 F.Supp. at 818.]

The *Overhead Door* Court rejected the argument, however, electing to follow the lead of the district court in *Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan v. Associated Wrecking Co.*, 484 F.Supp. 582 (D.Neb. 1980) and in doing so rejected the reliance by the plaintiff fund on *Lewis v. Benedict Coal Corp.*, *supra*, and its progeny:

> The laudable policy considerations behind the decisions disallowing contractual defenses in trust fund cases include guaranteeing "hard working people the unemployment, health and retirement protections that they and their families expect to receive as part of the terms of their employment" and foreclosing the "possibility that an employer will surprise its employees at a late date that it was not legally bound to provide for contingencies that may afflict them or their families in the future." *Huge v. Long's Hauling Co.*, at 465. These very important concerns, however, are absent in a case such as the instant one involving, as it does, a voidable agreement upon which no reasonable expectations of future benefits may be based.
>
> [488 F.Supp. at 819.] [21]

Accordingly, during the July 29, 1980 Senate floor debate on the joint Finance Committee-Labor Committee version of S.1076, Senator Matsunaga asked Senator Williams, the Chairman of the Labor Committee and a sponsor and the floor manager of S.1076, about the impact of the bill's delinquent contributions provisions on cases

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[21] The same analysis led to the same conclusion in *Western Washington Laborers—Employers Health & Security Trust Fund v. McDowell*, —— F.Supp. ——, 103 LRRM 2219 (W.D. Wash.) which was decided in December 1979. *McDowell*, like *Overhead Door*, was an action brought by multiemployer trust funds to enforce the contribution provisions of a § 8(f) agreement.

such as the district court decision in *Overhead Door Co., supra*:

> *Mr. Matsunaga*: If the floor manager will yield further, the recourse available to multiemployer pension plans under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. May I inquire of the floor manager, does the bill improve the legal recourse available to plans against delinquent employers?
>
> *Mr. Williams*: Yes, it does . . . . On the whole question of delinquent contributions and the withdrawal liability collection, the bill provides a direct and I suggest unambiguous cause of action under ERISA to a plan against a delinquent employer.
>
> *Mr. Matsunaga*: If I may pose a further question, *in some recent cases such as the Washington Area Carpenters Fund Overhead Door Co. case, a simple collection action brought by plan trustees, has been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise of contributions and the plan's entitlement to the contributions. Would the bill correct this situation?*
>
> *Mr. Williams*: *I feel that it would correct the situation. It is essential to the financial health of multiemployer plans that they and their actuaries be able to rely on an employer's contribution promises.*
>
> Further, plan participants for whom the employer promises to make pension contributions to the plan in exchange for their labor are entitled to rely on their employer's promises. *The bill clarifies the law in this regard* by providing a direct ERISA cause of action against a delinquent employer without regard to extraneous claims or defenses.
>
> *Mr. Matsunaga*: The Senator, of course, will agree that the provisions for employer withdrawal liability are central to this legislation. Will these same principles apply to claims by a plan for withdrawal liability?

Mr. Williams: Affirmative. Like suits to collect delinquent contributions, it is intended that a plan's claim for withdrawal liability not be subject to extraneous claims and defenses.

[126 Cong. Rec. S10102 (daily ed., July 29, 1980) (emphasis added). *See also Kaiser Steel Corp., supra*, 50 L.W. at 4156 n.12.]

The Senate-passed S.1076 was sent to the House as a substitute bill for the House version. During House consideration of the Senate substitute, Representative Thompson, floor manager of H.R. 3904, gave the following explanation of the purpose and meaning of § 306 of the Senate bill, elaborating on the earlier Senate reports and floor statements:

> Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. This should not be the case. *Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law*—other than 29 U.S.C. § 186. *Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.* In this regard we endorse judicial decisions such as *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis v. Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir., 1962); and *Huge v. Long's Hauling Company, Inc.*, 590 F.2d 457 (3d Cir., 1978). *Cases such as Western Washington Laborers-Employers Health and Security Trust Fund v. McDowell*, —— F.Supp. ——, 103 LRRM 2219 (W.D. Wash., 1979) and *Washington Area Carpenters Welfare Fund, et al. v. Overhead Door Company*, C.A. No. 79-0097, U.S.D.C. D.C., April 22,

> 1980, *are considered to have been incorrectly decided* and *this legislation is intended to clarify the law* in this respect by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer.
>
> These same principles apply to a plan's claim for employer withdrawal liability assessed in accordance with this legislation.
>
> The public policy of this legislation to foster the preservation of the private multiemployer plan system necessitates that provision be made to discourage delinquencies and simplify delinquency collection.
>
> [126 Cong. Rec. H7899 (daily ed., August 26, 1980) (emphasis added).]

The next day during the Senate floor debate on whether to accept certain House amendments to the Senate bill, Senator Williams gave precisely the same explanation of § 306. (126 Cong. Rec. S11673 (daily ed., August 26, 1980.) We have not found any statement in the legislative record contradicting or qualifying Senator Williams' or Representative Thompson's explanations of § 306.

These specifications of what § 306(a) means, which are completely consistent with and give content to that provision's general words, carry great weight. As the Court stated in *North Haven Board of Education v. Bell*, —— U.S. ——, 50 L.W. 4501 (May 17, 1982), the most recent decision discussing the significance of such floor statements and one which concerned a remarkably similar legislative situation:

> Although the statements of one legislator made during debate may not be controlling, *see, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979), Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction. *See, e.g., FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564

(1976) (such statements "deserv[e] to be accorded substantial weight . . . .") ; *NLRB v. Fruit Packers*, 337 U.S. 58, 66 (1964) ; *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951). And, because §§ 901 and 902 originated as a floor amendment, no committee report discusses the provisions; Senator Bayh's statements—which were made on the same day the amendment was passed, and some of which were prepared rather than spontaneous remarks—are the only authoritative indications of congressional intent regarding the scope of §§ 901 and 902.

[50 L.W. at 4504.]

The Congressional intent to resolve the issue in this case against the position of McNeff, Inc. is manifest. By specifically repudiating the line of district court decisions holding the contribution provisions of § 8(f) agreements unenforceable by plan trustees absent the trustees' ability to satisfy the court as to the union's majority status, Congress left no doubt that § 8(f) agreements do fall within the scope of § 306 of MPPAA and that the lack of majority status is not a defense to contribution collection suits brought by plan trustees.[22]

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[22] That the lack of union majority status is not a defense to suits by pension funds to collect employer withdrawal liability is also made clear by the floor managers' above-quoted statements. Like the collection of delinquent contributions, the collection of withdrawal liability from employers was deemed "central to this legislation." And "[l]ike suits to collect delinquent contributions, it [was] intended that a plan's claim for withdrawal liability not be subject to extraneous claims and defenses." *See* Williams-Matsunaga colloquy quoted at pp. 22-23, *supra*. *See also* Representative Thompson's statement quoted at pp. 23-24, *supra*. Withdrawal liability is generally assessed when an employer which has been "obligated to contribute" to a plan ceases to be so obligated. *See* 29 U.S.C. § 1383. The close relationship of contribution collection and collection of withdrawal liability in the legislature's eyes is reflected in ERISA § 4221(d), 29 U.S.C. § 1401(d), as added by MPPAA § 104(2), which treats non-payment of withdrawal liability as non-payment of contributions under ERISA § 515.

3. The legislative rejection of the lack of union majority defense reflects a recognition that permitting employers to raise such a defense to enforcement of their contribution promises would convert contribution collection actions into "lengthy, costly and complex litigation" contrary to the legislative purpose of simplifying and expediting the collection process. Consideration of such a defense would necessarily and impermissibly embroil the judiciary in determining appropriate bargaining units in which to measure the signatory union's majority status, identifying the members of the bargaining units, and evaluating the proofs of majority status. *See* 29 U.S.C. § 159. *See also generally* NLRB General Counsel Guidelines on Construction Pre-Hire Agreements, *reprinted in* 1979 Labor Relations Yearbook 349-364 (BNA 1980); *Giordano Construction Co.*, 256 NLRB No. 10, 107 LRRM 1164 (1981). These inherently factual representation issues have heretofore been deemed to fall within the exclusive province of the National Labor Relations Board. *South Prairie Construction Co. v. Local No. 627, IUOE*, 425 U.S. 800, 804-805 (1976). Such issues are "extraneous" and "unrelated" to the enforcement by the courts of the employer's promise in its § 8(f) agreement to make contributions to employee benefit trust funds.

The district court opinion in *Overhead Door* well illustrates the morass in which courts would be entangled if required to probe the representative status of the signatory union in collection suits brought by fund trustees. The court in that case would have conditioned enforcement of the contribution obligation of the employer on the fund trustees affirmatively proving that the union had the support of a majority of employees at each of the employer's jobsites over the 10-year period during which the employer's § 8(f) agreement was in effect. *See* 488 F.Supp. at 819.

In addition to involving the courts in deciding issues committed by statute to the NLRB, cognizance of the

lack of majority status defense in trustee collection actions would interject fund trustees into union-employer disputes of the type from which national pension and labor policies have sought to insulate them. *See NLRB v. Amax Coal Co., supra; Lewis v. Benedict Coal Corp., supra.*

4. The attention of MPPAA's sponsors to the particular collection problems of construction industry multiemployer plans operating under § 8(f) agreements, reflected in the statements quoted at pp. 22-24, *supra*, was an extension of Congress' long-standing recognition that the construction industry presents atypical characteristics which fundamentally affect the nature of collective bargaining in that industry. In its consideration of the problems which made MPPAA necessary, Congress once again recognized those characteristics. In light of these special industry characteristics, and of the large number of workers and their families dependent on such plans for retirement security,[23] MPPAA provides special employer withdrawal liability rules for construction industry pension plans. *See* ERISA § 4203(b) and § 4308(d)(1), 29 U.S.C. §§ 1383(b), 1388(d)(1), as added by MPPAA § 104(2). The need for these special withdrawal rules was described as follows in H. Rep. No. 96-869 (Part I) at 75-76:

> In the construction industry, the funding base of the plan is the construction projects in the area covered by the collective bargaining agreements through which the plan is maintained. An individual employee will typically work for tens or even hundreds of different employers over his or her working career,

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[23] *See* PBGC: Recommendations to the Congress for Revising Multiemployer Plan Termination Insurance, at 2, n.2 (February 1979): "[A]bout one-half of all covered multiemployer plans and one-fourth of all participants are in the construction industry, which is characterized by irregular employment. These multiemployer construction industry plans cover about two-thirds of total construction industry employment."

> and the volume of work for a given employer will often fluctuate greatly from year to year. These normal events do not pose an undue threat to a plan as long as contributions are made for whatever work is done in the area. Therefore, the construction industry exception is designed to impose liability only on former contributors that continue to work within the plan's area.[24]

The foregoing excerpts from the MPPAA legislative history, which closely resemble the Congressional rationale for enacting § 8(f),[25] demonstrate that Congress understood that construction industry multiemployer plans are dependent for their very survival on § 8(f) agreements. If McNeff, Inc.'s position is upheld, such plans will no longer be able to depend on the contribution promises contained in § 8(f) agreements contrary to the assumptions which lie at the heart of the MPPAA regulatory scheme for the construction industry.

5. The foregoing, we believe, demonstrates that McNeff, Inc. is wrong in its contention that the "not inconsistent with law" language in § 306(a) precludes the enforcement of § 8(f) agreements under § 306(a). But since this Court has already had occasion in *Kaiser Steel Corp. v. Mullins*, *supra*, to construe that clause, we add a final word on the impact of that decision here. As the *Kaiser Steel* opinion emphasized, the limits of the "inconsistent with law" defense were well settled in this Court at the

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[24] *See also* Senate Labor Committee—Finance Committee Joint Explanation of S. 1076, 126 Cong. Rec. S10116 (daily ed., July 29, 1980) and remarks of Representative Thompson at 126 Cong. Rec. H7900 (daily ed., August 26, 1980).

[25] "There were two aspects peculiar to the building trades that Congress apparently thought justified the use of prehire agreements with unions that did not represent a majority of the employees: . . . The Senate Report also noted that '[r]epresentation elections in a large segment of the industry are not feasible to demonstrate . . . majority status due to the short periods of actual employment by specific employers.'" *Iron Workers*, 434 U.S. at 348-349.

time Congress was considering MPPAA. In that opinion the Court quoted with approval the following passage from *Kelly v. Kosuga*, 358 U.S. 516, 520-521 (1959): "[p]ast the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful * * * the courts are to be guided by the overriding general policy . . . 'of preventing people from getting other people's property for nothing when they purport to be buying it.'" 50 L.W. at 4154. *Kaiser Steel* holds that § 306(a) through its "not inconsistent with law" language maintains that policy. 50 L.W. at 4153.

The legislative history of § 306(a) makes it plain that, with that one exception, the MPPAA policy applicable in the § 8(f) agreement context as well as all others is to "prevent people from getting other people's [labor] for nothing [or less than the agreed-upon payment] when they purport to be buying it." In Senator Williams' apt summary, "plan participants for whom the employer promises to make pension contributions to the plan in exchange for their labor are entitled to rely on their employer's promises." 126 Cong. Rec. S10102 (daily ed., July 29, 1980) (remarks of Senator Williams). *See also* 126 Cong. Rec. S11673 (daily ed., August 26, 1980) (remarks of Senator Williams); 126 Cong. Rec. H7899 (daily ed., August 26, 1980) (remarks of Representative Thompson).

6. McNeff, Inc. finally asserts that the reading of § 306 (a) and its legislative history just stated assumes that Congress implicitly repealed § 8(f). We have made no such assumption. The floor statements of the sponsors of § 306(a) demonstrate their view that under then-existing law an employer could not preclude enforcement by fund trustees of its pension contributions under a § 8(f) agreement on the basis that the signatory union had not attained majority status. On that view, the district court decisions barring enforcement of contribution obligations under § 8(f) agreements were "incorrectly decided" under *Lewis v. Benedict Coal Corp.*, *supra*, and

its progeny. *See* pp. 22-24, *supra*. Hence there was no need to repeal any law but only to "clarify" and reaffirm preexisting law to prevent repetition of the errors of *Overhead Door Co.* and *McDowell*.

Whether Congress' perception of the status quo with respect to the enforceability by plan trustees of § 8(f) prehire agreements was accurate or not is irrelevant. "[T]he relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Woelke and Romero Framing, Inc.*, *supra*, 50 L.W. at 4541, *quoting*, *Brown v. GSA*, 425 U.S. 820, 828 (1976). Here Congress perceived, correctly we believe, that the law prior to MPPAA permitted plan trustees to enforce employer promises in § 8(f) agreements to make pension contributions, notwithstanding the minority representative standing of the signatory union. Accordingly, no repeal was thought to be necessary and the Congressional intent to preclude the lack of majority status defense must be implemented.

CONCLUSION

For all the reasons set forth above, the NCCMP urges this Court to affirm the decision of the Court of Appeals in this case.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1982

JIM MCNEFF, INC., PETITIONER

v.

FRANK L. TODD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTIONS PRESENTED

1. Whether it is contrary to the policies of the National Labor Relations Act to permit monetary obligations that accrued under a prehire contract authorized by Section 8(f) of the Act, 29 U.S.C. 158(f), prior to its repudiation to be collected in a suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, without proof that the union represented a majority of the employees.

2. Whether, in an action to collect overdue trust fund contributions under a valid Section 8(f) contract, Section 306(a) of the Multiemployer Pension Plan Amendments of 1980, 29 U.S.C. (Supp. IV) 1145, precludes an employer from raising the defense that the union never acquired majority status.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2150

JIM MCNEFF, INC., PETITIONER

v.

FRANK L. TODD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States (J.A. 59).*

STATEMENT

1. Petitioner, an employer in the construction industry, obtained a subcontract on a construction project for which the general contractor was bound by the Master Labor Agreement ("the Agreement") negotiated between the International Union of Operating Engineers ("the

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* The National Labor Relations Board takes no position with respect to the second issue, the effect of the Multiemployer Pension Plan Amendments Act of 1980.

Union") and the Southern California General Contractors Associations. The Agreement prohibited the subcontracting of work to be performed at the construction site except to a subcontractor signatory to a labor agreement with the Union. It also contained a union security clause requiring covered employees to become members of the Union (J.A. 38-39).

On September 13, 1978, petitioner's president, Jim McNeff (McNeff), was approached on the jobsite by a representative of the Union, who informed him that in order to remain on the project he was required to sign the Agreement. McNeff initially refused, but when the Union representative returned with a representative of the general contractor, who stated the same requirement for remaining on the project, McNeff signed the Agreement.[1] Petitioner's three employees were advised that the union security provision of the Agreement required them to sign union cards, and they did so that same day (Pet. App. 2, 14, 16; J.A. 40).

The Agreement required petitioner to make monthly contributions to fringe benefit trust funds on behalf of each covered employee (J.A. 12-13). From October 1978 through March 1979 petitioner submitted required monthly reports to the trust funds, but made no contributions. Petitioner stated in each report that "no members of this craft were employed during the month" (Pet. App. 2).

In November 1978, after petitioner filed the first such report, respondents, the trustees of the funds, requested permission from petitioner to audit its records to verify the statements made in its monthly report. Petitioner agreed, but then postponed the audit several times. Fi-

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[1] Specifically, petitioner signed an agreement with the Union's Local 12 that "adopted [the Master Labor Agreement] in its entirety," with certain specified exceptions (J.A. 9-13). We use "the Agreement" herein to refer to both the Master Labor Agreement and the agreement between petitioner and Local 12 incorporating by reference the majority of the terms of the Master Agreement.

nally, on April 4, 1979, respondents brought suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, to compel an accounting and payment of any contributions found to be due the trust funds. An audit performed shortly thereafter revealed that petitioner had employed five employees covered by the Agreement during the period October 1978 through March 1979 and therefore owed a total of $5,316.79 in trust fund contributions for that period (Pet. App. 2; J.A. 27-31).[2]

2. The district court granted respondents' motion for summary judgment and ordered payment of the unpaid trust fund contributions (Pet. App. 10-11). The court of appeals affirmed (Pet. App. 1-9).

The court of appeals noted at the outset that the agreement between petitioner and the Union was a prehire agreement entered into before the Union represented a majority of petitioner's employees. The court further noted that Section 8(f) of the National Labor Relations Act, 29 U.S.C. 158(f), permits an employer in the construction industry to enter into such an agreement, although the agreement does not establish a binding bargaining relationship until the union represents a majority of the employees. The court rejected petitioner's contention that, because it was entitled to repudiate the prehire agreement on the ground that the Union had not obtained

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[2] A month after respondents instituted suit, petitioner filed an election petition with a Regional office of the National Labor Relations Board for a unit comprising its employees performing work of the kind covered by the Agreement. The Union responded by filing a charge alleging that petitioner had violated Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), by failing to comply with the Agreement and repudiating it. The Regional Director declined to issue a complaint on the ground that the execution of the prehire agreement and the action of the three employees in joining the Union at petitioner's behest were inadequate to establish a full collective bargaining relationship between petitioner and the Union. The Regional Director's refusal was sustained on appeal to the Acting General Counsel. In the subsequent election, petitioner's employees voted against representation by the Union (Pet. App. 2, 29-35; J.A. 50-53).

majority status, the agreement was void ab initio and could not be judicially enforced even prior to repudiation. Citing *NLRB* v. *Local 103, International Association of Bridge Workers* (*Higdon*), 434 U.S. 335, 341 (1978), for the proposition that a prehire agreement is "voidable" rather than void, the court of appeals concluded that the agreement could be enforced until the employer exercised its right to repudiate it (Pet. App. 3-7).

The court also found that petitioner had not repudiated the contract. It pointed out (Pet. App. 8) that "[t]he only act in the record which could possibly be argued to be a repudiation is the employer's failure to perform its contractual obligations." While the court recognized (*ibid.*) that, in some cases, as in *Higdon*, "noncompliance can be so bald as to put the union on notice of the employer's intent to repudiate," it found no such notice inherent in petitioner's conduct—"enjoying the benefits of a pre-hire agreement and misleading the union as to the employer's intention of never performing its obligations" (*ibid.*).

Finally, the court of appeals held (Pet. App. 8) that it was immaterial whether the circumstances under which petitioner signed the agreement constituted coercion "because the employer has raised this issue in the wrong way." The court explained that petitioner should, instead, have treated the alleged coercion simply as a ground for repudiation. In the absence of such repudiation, the court held, the contract remained enforceable (*id.* at 8-9).

SUMMARY OF ARGUMENT

I

Section 8(f) of the National Labor Relations Act, 29 U.S.C. 158(f), allows employers engaged primarily in the building and construction industry and unions that have not yet established their majority status to enter into agreements covering employees who are "engaged (or who, upon their employment, will be engaged) in the

building and construction industry * * *." Permitting monetary obligations that accrue under such an agreement prior to its repudiation to be collected in a suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, comports with the policies of the National Labor Relations Act.

A Section 8(f) contract both serves as a preliminary step to the union's achieving status as bargaining representative, and also "sets the compensation for services rendered to the employer while the agreement remains in effect." *Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.*, 681 F.2d 1, 9 (D.C. Cir. 1982). Such an agreement is voluntary, and the employer retains the right unilaterally to repudiate or modify it in the absence of the union's establishment of majority status. These principles are in no way compromised by retrospective enforcement of an 8(f) agreement for the period prior to repudiation. Such enforcement does not require the employer to continue to recognize or bargain with the union, but merely requires it to perform its part of a bargain already struck at a time when it lawfully and voluntarily recognized the union—and then only until it makes clear that the bargain is no longer operative.

Moreover, the final proviso to Section 8(f) affords employees the right to call for an election at any time if they are dissatisfied with an 8(f) agreement. The exercise of the employees' right to reject the contract terminates the union's Section 8(f) right to act as a lawful representative of the employees for the future. Collecting obligations that accrued prior to that time thus is not inconsistent with the employees' free choice of bargaining representative.

Contrary to petitioner's repeated assertions, there is no inconsistency between the Board's holding that an employer does not violate Section 8(a)(5) of the Act by refusing to honor a prehire agreement where the union has not established its majority status and permitting private suits for the collection of wage and fringe benefit payments owed under a lawful 8(f) contract that the

signatory employer purported to honor during the period covered by the suit. The statutory obligation to recognize and bargain with a union applies only to the representative of a majority of the employees in the bargaining unit. Hence, the failure of an employer openly to repudiate a contract is irrelevant in an unfair labor practice case, if the union actually lacks majority status. But this does not mean that any policy of the Act is violated when a court in a Section 301 suit holds an employer to its bargain under a Section 8(f) contract for a period prior to the time the union was notified of the employer's repudiation.

To the contrary, the policies underlying Section 8(f), as well as equitable considerations, fully support the conclusion that obligations accrued under contracts authorized by that Section may be enforced in private suits without proof that the signatory union represented a majority of the employees. One of the reasons for Congress' enactment of Section 8(f) in the first place was its recognition that it was not feasible for unions in the construction industry to demonstrate majority support because of the short duration of employment in that industry. Surely Congress did not intend unions to be required to make a showing in suits to enforce Section 8(f) contracts that it considered nearly impossible to make when enacting that Section. Moreover, as the District of Columbia Circuit observed in *Overhead Door*, *supra*, 681 F.2d at 9, "[w]e do not believe Congress intended to permit an employer to accept labor services under a prehire agreement, refuse to pay wages, and yet be immune from suit to recover the wages on the ground that the contract is unenforceable."

Nor is any legitimate employer interest impaired if the wages and fringe benefits earned by employees under lawful 8(f) contracts are recoverable in Section 301 suits. Employers are under no statutory compulsion to enter into such agreements, and those who voluntarily do so receive valuable benefits in return.

II

Section 306(a) of the Multiemployer Pension Plan Amendments Act of 1980 (MPPA), 29 U.S.C. (Supp. IV) 1145, provides an alternative ground for affirmance of the decision of the court of appeals. That Section requires employers who are obligated to make contributions to multiemployer plans under the terms of the plan or under the terms of a collective bargaining agreement to make such contributions "to the extent not inconsistent with law." It was enacted because simple collection actions brought by trustees of multiemployer plans had been converted into complex litigation by employers' raising defenses unrelated to their promise to pay and the plans' entitlement to the contributions. During floor debate on the provision, its sponsor in each House cited as an example of the defenses the legislation was designed to abolish the precise defense petitioner urges here. This legislative history establishes clearly that Congress intended that trust fund contributions due under a Section 8(f) agreement would be recoverable notwithstanding the minority status of the signatory union.

This contention is fully consistent with this Court's decision last term in *Kaiser Steel Corp.* v. *Mullins*, No. 80-1345 (Jan. 13, 1982). In that case, the Court held that Section 306(a) did not abolish illegality defenses. But, unlike NLRA Section 8(e), which was at issue in *Kaiser Steel* and which expressly makes agreements prohibited thereunder "unenforceable and void," Section 8(f) specifically sanctions prehire agreements; it thus would not have been inconsistent with law for petitioner to have honored the Agreement in the absence of the Union's establishing majority status. Accordingly, it is irrelevant to this case that illegality defenses to actions seeking recovery of trust fund contributions survived Section 306(a).

As the law currently in effect, Section 306(a) is applicable to this case notwithstanding that the MPPA was not in effect at the time the Agreement was signed. Neither the language nor the legislative history of Section

306(a) contains any suggestion that it was not intended to apply to pending cases. Nor would its application in this case result in "manifest injustice." *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974). The defense of unenforceability does not assert a vested private right. Moreover, the application of Section 306(a) to this case imposes no unforeseeable liability on petitioner, since it all along has known that it is a party to a contract that imposes on it the very obligations that it is now attempting to avoid.

ARGUMENT

I. IT IS CONSISTENT WITH THE POLICIES OF THE NATIONAL LABOR RELATIONS ACT TO PERMIT MONETARY OBLIGATIONS THAT ACCRUE UNDER A PREHIRE CONTRACT PRIOR TO ITS REPUDIATION TO BE COLLECTED IN A SUIT UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT WITHOUT PROOF THAT THE UNION REPRESENTED A MAJORITY OF THE EMPLOYEES

A. Section 8(f) of the National Labor Relations Act Permits Employers in the Building and Construction Industry Voluntarily to Enter Into Agreements With Unions That Have Not Established Their Majority Status, and This Court has Characterized Such "Prehire Agreements" as Valid Although "Voidable"

1. Section 8(f) of the National Labor Relations Act, 29 U.S.C. 158(f), was added to the Act in 1959 by the Landrum-Griffin Amendments, Pub. L. No. 86-257, 73 Stat. 545.[3] The Section permits employers engaged pri-

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[3] Section 8(f) provides:

> Agreements covering employees in the building and construction industry
>
> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agree-

marily in the building and construction industry and unions that have not yet established their majority status to enter into agreements covering employees who are "engaged (or who, upon their employment, will be engaged) in the building and construction industry * * *." Such agreements are known as "prehire agreements." As the Court recognized in *NLRB* v. *Local 103, International Association of Bridge Workers (Higdon)*, 434 U.S. 335, 345 (1978), Section 8(f) is an exception to the Act's usual proscription against bargaining between an employer and a union in advance of the union's establishing that it represents a majority of the employees in an appropriate bargaining unit.[4] This ex-

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ment covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

[4] Section 7 of the Act, 29 U.S.C. 157, guarantees employees the right to bargain collectively "through representatives of their own choosing." Section 9(a), 29 U.S.C. 159(a), limits the right to act as exclusive representative of employees for purposes of collective

ception, however, is of limited scope. A proviso to the Section declares that an 8(f) contract "shall not be a bar to a petition" for an election under Section 9.[5] Thus, "[t]he employer and its employees—and the union itself for that matter—may call for a bargaining representative election at any time" (*Higdon, supra*, 434 U.S. at 345).

In *Higdon*, the Court was concerned with "the legal questions of how § 8(f) is to be construed and of what

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bargaining to "[r]epresentatives designated or selected * * * by the majority of the employees in a unit appropriate for such purposes * * *." It is thus normally an unfair labor practice for an employer to grant, and for a union to accept, recognition as an exclusive representative at a time when the union lacks the support of a majority of the employees in the relevant unit. See, e.g., *International Ladies' Garment Workers Union* v. *NLRB*, 366 U.S. 731 (1961).

Section 8(f) was enacted in response to the special characteristics of the construction industry:

> In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated. The practice of signing such agreements for future employment is not entirely consistent with Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired. One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral.

S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959), 1 Leg. Hist. 424; see also H.R. Rep. No. 741, 86th Cong., 1st Sess. 19 (1959), 1 Leg. Hist. 777 ("Leg. Hist." refers to the two-volume *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* (1959)). See also *Higdon, supra*, 434 U.S. at 348.

[5] A union normally is protected from inquiry into its majority status during the term of a collective bargaining agreement. *Higdon, supra*, 434 U.S. at 345.

consequences the execution of a prehire agreement has on the enforcement of other sections of the Act, primarily §§ 8(a)(5) and 8(b)(7)(C)" (434 U.S. at 341).[6] Sustaining the Board's construction of these sections, the Court held that an agreement privileged by Section 8(f), while lawful, does not create a full collective bargaining relationship between the union and employer signatories, and that until this preliminary step towards such a relationship culminates in the establishment of a union majority among the relevant employee group, the agreement is "voidable" (*ibid*). Thus, an employer may violate or repudiate such an agreement without fear of liability under Section 8(a)(5) of the Act. See 434 U.S. at 345-346.

Furthermore, with respect to Section 8(b)(7)(C), the Court held that the Board could conclude that picketing to enforce a Section 8(f) agreement by a union that had not acquired majority status was tantamount to picketing to require recognition as the exclusive bargaining agent of the employer's employees. 434 U.S. at 346-349. It therefore affirmed the Board's finding that, since the picketing union in *Higdon* had failed to request an election within 30 days, its attempt to enforce its 8(f) agreement with the employer by picketing beyond that period violated Section 8(b)(7)(C).

2. An issue left unresolved in *Higdon* (see 434 U.S. at 351-352) is whether a Section 8(f) agreement, which an

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[6] Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. "Under § 8(b)(7)(C), a union that is not the certified representative of the employees in the relevant unit commits an unfair labor practice if it pickets an employer with 'an object' of 'forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees' and if it does not within 30 days file a petition for an election under § 9(c)." *Higdon, supra*, 434 U.S. at 338. The provision has not been construed literally, however. The Board holds that picketing by a union having majority support in an attempt to enforce a collective bargaining agreement is not barred by Section 8(b)(7)(C). 434 U.S. at 342-343.

employer is free to avoid without violating Section 8(a)(5) of the Act and which a union is not free to enforce beyond the limits set in Section 8(b)(7)(C), may nevertheless be enforced, in some or all respects, by a breach of contract action brought under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. 185(a). The courts of appeals have divided on this issue, with a majority of them joining the court below in answering the question in the affirmative.

The Fifth Circuit, relying on the statement in *Higdon*, *supra*, 434 U.S. at 345, that a construction industry "employer's duty to bargain and honor the contract is contingent on the union's attaining majority support at the various construction sites," has held that a Section 8(f) agreement can never be enforced in a Section 301 suit unless it is first determined that the union represented a majority of the employees in the relevant unit. *Baton Rouge Building and Construction Trades Council* v. *E.C. Schafer Construction Co.*, 657 F.2d 806, 809, 812-13 (1981). The Eleventh Circuit, believing itself bound by this Court's decision in *Kaiser Steel Corp.* v. *Mullins*, No. 80-1345 (Jan. 13, 1982) (see pages 27-28, *infra*), and a prior decision of the en banc Fifth Circuit (*NLRB* v. *Haberman Construction Co.*, 641 F.2d 351 (1981)),[7] appears to have adopted the same view. *Laborers District Council* v. *McDowell Contractors, Inc.*, 680 F.2d 94 (1982).

By contrast, the Ninth Circuit in the present case and the District of Columbia Circuit in *Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.*, 681 F.2d 1 (1982), have adopted the view that *Higdon*'s characterization of 8(f) agreements as "voidable" (434 U.S. at 341) extends to Section 301 enforcement suits as

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[7] As the Eleventh Circuit noted (*Laborers District Council* v. McDowell Contractors, Inc., 680 F.2d 94, 95 n.3 (1982), it is bound by decisions rendered by the "old" Fifth Circuit prior to October 1, 1981. See *Bonner* v. *City of Pritchard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

well. As Judge Wilkey explained for the court in *Overhead Door Co., supra*, 681 F.2d at 8,

> [S]ection 8(f) agreements are enforceable in a breach of contract action for the period from the date the agreement was made until the date when either party manifests its intent to void the agreement. We emphasize the limitations on this holding. Until the minority union obtains support of a majority of employees, the prehire agreement is not prospectively binding. Either party to the agreement may void it. While the agreement remains in effect, however, it must be observed by the parties.

The Eighth and Tenth Circuits also have held that proof of majority status is unnecessary in private suits for the collection of overdue fringe benefit contributions payable under Section 8(f) agreements. *Contractors Health & Welfare Plan* v. *Associated Wrecking Co.*, 638 F.2d 1128 (8th Cir. 1981); *New Mexico District Council of Carpenters* v. *Mayhew Co.*, 664 F.2d 215 (10th Cir. 1981).[8]

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[8] The court below contrasted its view with that of the Eighth and Tenth Circuits on the apparent assumption that they, unlike it, have concluded that a Section 8(f) agreement is enforceable in a Section 301 suit even with respect to the time period subsequent to repudiation (Pet. App. 4-5). In fact, neither of the cited cases purports to decide the voidability issue. In *Mayhew Co., supra*, no claims based on the post-repudiation period were presented. The employer had sent a notice on December 9, 1977, announcing its intention not to be bound by any successor agreement, and the trust fund contributions at issue under the existing agreement were for a period extending only "to December, 1977" (664 F.2d at 218). In *Associated Wrecking Co., supra*, the Eighth Circuit expressly declined to reach the question whether "a prehire agreement, even in the absence of majority status, may be enforced against an employer until the employer takes affirmative steps to void the agreement." (638 F.2d at 1130 & n.5 (citing *Florida Marble Polishers Health & Welfare Trust Fund* v. *Megahee*, 102 L.R.R.M. (BNA) 2740, 2741 (M.D. Fla. 1979)). Moreover, the court of appeals ultimately remanded the case to the district court for determination of the "duration" of the agreement (638 F.2d at 1134). Furthermore, in a subsequent decision the Eighth Circuit characterized its decision in *Associated Wrecking*

We show below that the latter position—that, regardless of the union's majority status 8(f) contracts may be retrospectively enforced against signatory employers who have failed to make the requisite payments for work performed by employees under those contracts—comports with national labor policy.

B. Enforcement Of Obligations Accrued Under A Prehire Contract Prior To Its Repudiation Does Not Impair The Right Of Employees To Select Their Own Bargaining Agent

1. Petitioner contends (Br. 25; emphasis in original) that judicial enforcement of retrospective obligations under a prehire agreement absent proof of the union's majority status "conflicts with the *fundamental right* of employees to select their own representative; is inconsistent with the statutory scheme requiring the union to establish its majority status; and, in effect, affords the union the presumption of majority status that Congress specifically rejected." But petitioner overlooks the fact that Section 8(f) was specifically intended as an exception to the rule forbidding agreements with minority unions (see *Higdon, supra*, 434 U.S. at 345; pages 9-10, *supra*); the question this case presents is the scope of that exceptional status. More specifically, petitioner's argument ignores both the fact that prehire agreements were designed to do more than serve as a preliminary step for the establishment of the union's status as bargaining representative as well as the distinction between retrospective and prospective enforcement of contractual obligations.

As Judge Wilkey observed for the court in *Overhead Door Co., supra*, 681 F.2d at 8,

> a prehire agreement serves two important purposes. First, it matures into a fully effective collective bar-

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as one dealing with a "prehire agreement [that] had been operable for two years," which the court had been "asked to enforce * * * retrospectively." *W.C. James, Inc.* v. *Oil Workers International Union*, 646 F.2d 1292, 1295 n.4 (1981).

> gaining agreement once the union represents a majority of the workers. Second, it serves as the terms of employment for the workers hired by the consenting employer. It is indisputable that Congress intended the second purpose; otherwise, section 8(f) would not permit prehire agreements ever to be followed prior to the union's demonstration of its majority status.

Thus, while the prehire agreement preliminarily establishes the union's status as bargaining agent, it also "sets the compensation for services rendered to the employer while the agreement remains in effect" (*Overhead Door Co., supra*, 681 F.2d at 9). To be sure, if an employer were ordered to adhere to the agreement prospectively, it would be deprived of its right unilaterally to repudiate or modify it in the absence of the union's establishment of majority status. As the court noted in *Overhead Door Co., supra*, 681 F.2d at 9 (emphasis in original; footnotes omitted), "[t]o hold that an employer is prospectively bound to follow section 8(f) contracts would contravene the principle that adherence to them be *voluntary*. Moreover, it would effectively force the employer to recognize and bargain with a union before the union had proved its majority status. This result would violate the policy of employee free choice which was emphasized in the [*Higdon*] decision." Retrospective enforcement of the terms of the agreement for the period prior to repudiation, however, does not require the employer to continue to recognize or bargain with the union. It is required only to perform its part of a bargain already struck at a time when it lawfully and voluntarily (see note 13, *infra*) recognized the union, and then only until such time as it makes clear that the bargain is no longer operative. See 681 F.2d at 9.

Moreover, as shown above (page 10, *supra*), the final proviso to Section 8(f) affords employees the right to call for an election at any time if they are dissatisfied with the 8(f) agreement, and Section 8(b)(7) protects this right from undue recognitional pressure. Permitting

retrospective enforcement of the monetary obligations that accrued prior to the employees' exercise of the Section 8(f) proviso right does not, contrary to petitioner's assertion (Br. 37-39), render their election rights meaningless. The exercise of the employee's election right to reject the contract terminates the union's Section 8(f) right to act as a lawful representative of the employees for the future. Collecting overdue obligations that accrued prior to that time thus is not inconsistent with the employee's free choice of bargaining representative.

The Board, too, has acknowledged the distinction between retrospective and prospective enforcement of a collective agreement. In *International Union of Operating Engineers, Local 150 (Tri-City Excavating, Inc.)*, 255 N.L.R.B. 597 (1981), the union, which had not acquired majority status, picketed an employer for more than 30 days without a representation petition having been filed in order to compel payment of trust fund obligations that had already accrued under a prehire agreement. The Board dismissed the allegation that the picketing violated Section 8(b)(7)(C) of the Act, concluding (255 N.L.R.B. at 601) that the object of the picketing was not "to secure recognition of the [union] as current bargaining representative or to require application of the recognition provision or other terms of the 8(f) agreement previously entered into." The Board asserted (*ibid.*) that its position was "consistent with the concept that relationships protected by Section 8(f) must be voluntary," pointing out (*ibid.*) that "[t]he [union's] picketing was limited to requiring the [employer] to meet obligations which allegedly had accrued under an 8(f) contract and was not directed at forcing continuation of the 8(f) relationship." Finally, the Board distinguished *Higdon*, explaining (*id.* at 601-602) that

> [i]n *Higdon*, a labor organization which had not attained majority status under an 8(f) contract picketed to require the contracting employer to apply the contract to its non-union operations. Satisfaction of the picketing demands there would have required

> current application of the 8(f) contract, including recognition of the labor organization as bargaining representative. In these circumstances the Board found the picketing was for initial recognition because the employer had no 8(a)(5) obligation, under the Board's decision in *R.J. Smith*, to continue in effect an 8(f) contract when the contracting union had not achieved majority support. The Court accepted the Board's finding that the picketing was recognitional in purpose. * * * The Court's statement that 'Picketing to enforce the Sec. 8(f) contract was the legal equivalent of picketing to require recognition as the exclusive agent' must be read in connection with the fact that the 'enforcement' there sought by picketing was current application of the 8(f) contract. Unlike that situation the 'enforcement' sought by the [union's] picketing [here] was payment of an alleged past obligation under the 8(f) contract and did not require current application of the contract.

2. Petitioner contends (Br. 30-32) that to require it to give notice to the Union of its repudiation of the contract in order to avoid retrospective liability in a Section 301 suit would be inconsistent with the Board's holding in *R.J. Smith Construction Co., Inc.*, 191 N.L.R.B. 693 (1971), which was approved by this Court in *Higdon*.[9] See also Pet. Br. 43-47. In *R.J. Smith*, the Board held that an employer does not violate Section 8(a)(5) of the Act by refusing to honor a prehire agreement where the union has not established majority status. But petitioner overlooks the critical distinction between the employer's obligation under the Act to deal with the representative of the majority of its employees and its duty to satisfy lawful contractual obligations that accrued during the

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[9] Thus, petitioner notes (Pet. 30) that, although in both *R.J. Smith* and a companion case, *Ruttman Construction Co.*, 191 N.L.R.B. 701 (1971), the employers had concealed their noncompliance with the contracts from the unions, the Board nevertheless held that, since the unions had never acquired majority status, the employers did not violate the Act by ignoring the contracts.

period when it ostensibly had accepted the contract—a distinction that marks the line between, on the one hand, the Board's concerns under Section 8(a)(5) of the Act, and, on the other, the concerns of a court applying federal contract law in a Section 301 suit.

Because the statutory obligation to recognize and bargain with a union applies only to the representative of a majority of the employees in the unit (see 29 U.S.C. 158(a)(5), 159(a)), the Board cannot bring the Act's sanctions to bear on an employer that refuses to honor a contract with a minority union. Hence, in cases involving alleged violations of Section 8(a)(5) of the Act, it is the union's majority status—not the employer's decision whether openly to repudiate the contract or secretly to ignore it—that is determinative. But the fact that the failure of an employer openly to repudiate a contract is irrelevant in an unfair labor practice case, if the union actually lacks majority status, does not mean that any policy of the Act is violated when a court in a Section 301 suit holds an employer to its bargain under a Section 8(f) contract for a period prior to the time the union was notified of the employer's repudiation,[10] during which time the employer reaped the benefits of that contract. See *Associated Wrecking Co.*, *supra*, 638 F.2d at 1133; *Mahew Co.*, *supra*, 664 F.2d at 219-220. Like the union's picketing in *Tri-City Excavating*, *supra*, the legal compulsion of such a lawsuit does not enforce any recognitional obligation. See *Overhead Door Co.*, *supra*, 681 F.2d at 9-10.

This distinction between contractual obligations and statutory obligations is consistent with the principles that

[10] The court below did not hold that formal notice of an intent to repudiate is always required, but rather acknowledged (Pet. App. 8) that, in a given situation, noncompliance might be "so bald as to put the union on notice of the employer's intent to repudiate." Petitioner does not contend that its conduct here was "so bald" as to put the Union on notice of its intent to repudiate; to the contrary, petitioner sought to conceal such intent by filing false reports with the trust funds (see page 2, *supra*).

not every breach of a collective bargaining agreement constitutes an unfair labor practice and that Congress contemplated that mere contractual breaches would be left for resolution by the usual processes of the law. See *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 186-187 (1971): cf. *NLRB* v. *Strong*, 393 U.S. 357, 360-361 (1969). Thus, in *Allied Chemical Workers*, the Court held that it was not an unfair labor practice for an employer to modify contractual provisions concerning the pension rights of retired employees. Since the employer had no obligation to bargain with the union concerning retired employees, the Court reasoned that matters affecting them were not mandatory subjects of bargaining. The Court cautioned (404 U.S. at 181 n.20; citation omitted), however, that

> [t]his does not mean that when a union bargains for retirees—which nothing in this opinion precludes if the employer agrees—the retirees are without protection. Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed. See *Smith* v. *Evening News Assn.*, 371 U.S. 195, 200-201 (1962); *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 470 (1960).

So, too, here. Because the Union is not the majority representative of petitioner's employees, it has no right to insist that petitioner bargain with it before altering the employees' terms of employment provided by the 8(f) contract. It does not follow, however, any more than it did in *Allied Chemical Workers*, that petitioner's pre-repudiation breach of the contract cannot be redressed in a Section 301 suit.

3. Nor is there merit to petitioner's assertion (Br. 36-37) that the holding below is incompatible with the Court's statement in *Higdon* (434 U.S. at 351-352), that

"[i]t would not be inconsistent with *Lion Dry Goods* [11] for a court to hold that the union's majority standing is subject to litigation in a § 301 suit to enforce a § 8(f) contract, just as it is in a § 8(a)(5) unfair labor practice proceeding, and that absent a showing that the union is the majority's chosen instrument, the contract is unenforceable." As the District of Columbia Circuit observed in *Overhead Door Co., supra*, 681 F.2d at 8 n.31,

> In *Lion Dry Goods* the Court held that § 301 of the Labor Management Relations Act confers jurisdiction on the federal courts to hear suits based on § 8(f) contracts. All *Iron Workers* [*Higdon*] added was that this holding did not compel the conclusion that § 8(f) agreements are enforceable, since the jurisdictional question differs from the enforceability question. Nothing further can be read into *Iron Workers*.[12]

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[11] *Retail Clerks International Association* v. *Lion Dry Goods, Inc.*, 369 U.S. 17 (1962). There, the Court held that Section 301 confers jurisdiction on the federal courts to entertain suits on contracts between an employer and a minority union, as well as those with majority-designated collective bargaining agents. *Id.* at 28-29. Section 8(f) contracts were expressly noted as being in the former category. 369 U.S. at 29.

[12] Petitioner also relies (Br. 21) on certain language contained in the Board's reply brief in *Higdon, supra*. It was the Board's position in *Higdon*, which the Court subsequently adopted, that a Section 8(f) agreement does not make a union the collective bargaining representative of unit employees so as to permit it to enforce the agreement by picketing in excess of the limits prescribed by Section 8(b)(7)(C) of the Act for recognitional picketing. The union argued, however, that *Lion Dry Goods* was contrary to the Board's position. In its reply brief (at 2), the Board responded that, in *Lion Dry Goods*, the Court held only that federal courts have jurisdiction under Section 301(a) to entertain suits on agreements with a minority union, not that such agreements would be fully enforceable in all circumstances. The brief further explained (at 2-3) that *Lion Dry Goods* could not have meant that agreements would be enforceable even when this would contravene the policies of the National Labor Relations Act. But the Board suggested (*Higdon* Reply Brief at 2-3) several examples of circumstances in which a suit could properly be brought under Section 301(a), and one of

C. The Policies Underlying Section 8(f), as Well as Equitable Considerations, Support the Conclusion That Obligations Accrued Under Contracts Authorized by That Section May be Enforced Through Private Suits Without Proof That the Signatory Union Represented a Majority of the Employees

The policies underlying Section 8(f) are fully consistent with the rule that, regardless of majority status, contracts authorized by that Section may be retrospectively enforced to collect overdue fringe benefit contributions. Congress enacted Section 8(f) in part to make possible continuous contract coverage for construction employees, who, in the normal exercise of their duties, might work on various projects only for short periods of time or during phases of the project when the number of employees on the site was not a representative complement for purposes of determining majority support. See *Higdon, supra*, 434 U.S. at 348-349; note 4, *supra*. It is antithetical to this purpose to permit an employer to accept the labor of these employees under a contract that Congress determined should be lawful and then to avoid paying the contract price of their services by pointing to a fact—the union's inability to prove majority status within the meaning of Section 9(a) of the Act—that was one of the reasons for Congress' enacting Section 8(f) in the first place. "It is hardly reasonable to suppose Congress intended unions to be required to make a showing in suits to enforce § 8(f) contracts which it considered nearly impossible to make when enacting that section." *Martin* v. *Benesh & Burns, Inc.*, 532 F. Supp. 408, 415 (N.D. Ill. 1982) (footnote omitted). As the District of Columbia Circuit added in *Overhead Door Co., supra*, 681 F.2d at 9, "[w]e do not believe Congress intended to permit an employer to accept labor services under a prehire agreement, refuse to pay wages, and yet

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those circumstances was an instance in which the employer "agrees to be bound by the agreement."

be immune from suit to recover the wages on the ground that the contract is unenforceable."

Moreover, as *Tri-City Excavating*, *supra*, illustrates (255 N.L.R.B. at 599, 601), where the employer does not (as petitioner did here) file false reports with the fringe benefit trust funds, but instead honestly reports the names of the covered employees, the employees are entitled to collect benefits from the trust funds. It can hardly be said to be in the employees' interests for the employer to fail to make the contributions necessary to assure the continued payment of these fringe benefits and thereby jeopardize the employees' ability to collect full benefits from these funds in the future. And should the employees subsequently determine that they no longer wish to remain eligible to receive benefits under these trust funds, they retain the power under Section 8(f)'s proviso to reject the contract and end their employer's liability to make payments on the basis of the work they perform in the future.

Nor is any legitimate employer interest impaired if the wages and fringe benefits earned by employees under lawful 8(f) contracts are recoverable in Section 301 suits. Employers are under no statutory compulsion to enter into such agreements with construction unions, and, as the majority of the courts of appeals that have considered the issue have recognized, employers who voluntarily [13] execute such contracts thereby qualify to re-

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[13] Contrary to petitioner's assertion (Br. 41-43), this case presents no occasion for the Court to determine whether accrued obligations under an 8(f) contract could be enforced in a Section 301 suit where the contract was entered into as a result of unlawful union coercion. See *Woelke & Romero Framing, Inc.* v. *NLRB*, No. 80-1798 (May 24, 1982); slip op. 18 n.17; see also *Connell Construction Co.* v. *Plumbers Local 100*, 421 U.S. 616, 632-633 (1975). Petitioner does not allege that the Union representative did anything other than inform McNeff that he would be required to sign the Master Labor Agreement to remain on the project (Br. 4). The prime contractor's representative also stated those same terms for remaining on the project. The Union neither picketed nor threat-

ceive valuable benefits—among them a reliable means for computing construction labor costs in advance of bidding, access to a supply of skilled workers readily available for dispatch as the needs of the job demand, and a reasonable assurance of labor peace for the duration of the agreement. *Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co., supra*, 681 F.2d at 8-9; *New Mexico District Council of Carpenters* v. *Mayhew Co., supra*, 664 F.2d at 220; *Contractors Health & Welfare Plan* v. *Associated Wrecking Co., supra*, 638 F.2d at 1134. Moreover, where, as here, the union has a collective bargaining agreement with the general contractor requiring that subcontracts be let only to employers signatory to an agreement with the union, a subcontractor that signs a prehire agreement with the union receives, as petitioner did, the benefit of obtaining, and retaining, a job with that general contractor.[14] "Thus, the benefits of a prehire

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ened to picket; rather, it was the prime contractor's power to cancel the subcontract that "coerced" petitioner into accepting those conditions and signing the Agreement. Put another way, the prime contractor made it clear that the contract conditions included signing the Master Labor Agreement, a perfectly lawful condition in the construction industry (see note 14, *infra*). An implied threat by one party not to contract unless certain lawful terms are agreed to is "an accepted part of the bargaining process" and does not result in a void contract. *Restatement (Second) of Contracts* § 176, Comment a, at 482 (1981). Neither is it a violation of the Act for one employer to refuse to deal with another employer because of the union or nonunion status of the latter's employees. *Local 447 (Malbaff Landscape Construction)*, 172 N.L.R.B. 128, 129 (1968).

[14] As this Court held in *Woelke & Romero Framing, supra*, slip op. 16, union signatory subcontracting clauses are lawful in the construction industry, and fulfill legitimate needs of the employees of the various subcontractors on a construction job, who "have a close community of interest" and whose wages and working conditions affect each other. The Court also noted (*id.* at 19) that, "[w]hen a union obtains a subcontracting clause from a general contractor, subcontractors frequently attempt to ensure that they remain eligible for work by entering into a § 8(f) agreement * * * with the union."

agreement for fringe benefits do not travel down a one-way street. An employer who accepts the benefit of such an agreement must also honor its obligation under that agreement." *Contractors Health & Welfare Plan* v. *Associated Wrecking Co., supra,* 638 F.2d at 1134.

II. SECTION 306(a) OF THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980 PRECLUDES AN EMPLOYER FROM RAISING THE UNION'S MINORITY STATUS AS A DEFENSE TO AN ACTION TO COLLECT OVERDUE TRUST FUND CONTRIBUTIONS UNDER A VALID 8(f) CONTRACT

A. In Enacting Section 306(a) Congress Intended to Foreclose the Precise Defense Petitioner Seeks to Raise Here

Section 306(a) of the Multiemployer Pension Plan Amendments Act of 1980 (MPPA), 94 Stat. 1295, 29 U.S.C. (Supp. IV) 1145, provides an alternative ground for affirmance of the decision of the court of appeals. That section, which is entitled, "Delinquent contributions," provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

The legislative history of Section 306(a) makes clear that Congress specifically intended it to prohibit employers from raising the minority status of a union signatory to an 8(f) agreement in a suit for the collection of overdue trust fund obligations payable under the agreement. The Section was enacted because "simple collection actions brought by plan trustees [had] been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions," and

steps were necessary to "simplify delinquency collection." Staff of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *The Multiemployer Pension Plan Amendments Act of 1980, S. 1076: Summary and Analysis of Consideration* 44 (Comm. Print 1980); See *Kaiser Steel Corp.* v. *Mullins*, No. 80-1345 (Jan. 13, 1982), slip op. 14. During floor debate, Senator Williams and Representative Thompson [15] cited case law examples of the types of defenses the provision was designed to abolish (126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980); *id.* at S11673; see *Kaiser Steel Corp.* v. *Mullins*, *supra*, slip op. 14-15):

> [W]e endorse judicial decisions such as *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis* v. *Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962); and *Huge* v. *Long Hauling Company, Inc.*, 590 F.2d 457 (3rd Cir. 1978) [, cert. denied, 442 U.S. 918 (1979)]. Cases such as *Western Washington Laborers-Employers Health and Security Trust Fund* v. *McDowell* * * *, 103 LRRM 2219 (W.D. Wash., 1979) and *Washington Area Carpenters Welfare Fund, et al.* v. *Overhead Door Company*, [488 F. Supp. 816 (D.D.C. 1980)], are considered to have been incorrectly decided and this legislation is intended to clarify the law in this respect by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer.

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[15] The provision that eventually was enacted as Section 306(a) of the Multiemployer Pension Plan Amendments Act of 1980 was added to S. 1076, 96th Cong., 2d Sess. (1980), the Senate counterpart of H.R. 3904, 96th Cong., 2d Sess. (1980), which became the Act, by the Senate Committee on Labor and Human Resources. Senator Williams was Chairman of the Senate Committee on Labor and Human Resources and floor manager of S. 1076. Representative Thompson was Chairman of the House Education and Labor Committee and floor manager of H.R. 3904. *Kaiser Steel Corp.* v. *Mullins*, *supra*, slip op. 14 & n.10. As this Court has noted, the explanation of a provision by the chairman of the committee that proposed it "is entitled to substantial weight." *Woelke & Romero Framing, Inc.* v. *NLRB*, *supra*, slip op. 10 n.9.

Both cases the Congressmen cited with disapproval concerned the precise issue that is involved here: whether the alleged invalidity of a prehire agreement under Section 8(f) of the NLRA prevented pension fund trustees from collecting delinquent contributions. In each case, the district court had resolved that question against the pension fund.[16] The floor managers' disapproval of the results in those cases thus clearly establishes that Congress intended that contributions due under a Section 8(f) agreement would be recoverable notwithstanding the signatory union's minority status. Additional evidence of this congressional intent is supplied by the same Congressmen's floor statements to the effect that "[f]ederal pension law must permit trustees of plans to recover delinquent contributions efficaciously, *and without regard to issues which might arise under labor-management relations law* —other than 29 U.S.C. 186."[17] 126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980) (emphasis added); *id.* at S10102 (daily ed. July 29, 1980) (emphasis added).[18]

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[16] Both cases were reversed on appeal after passage of the MPPA. See *Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.*, 681 F.2d 1 (D.C. Cir. 1982) (discussed at pages 12-13, *supra*); *Western Washington Laborers-Employers Health & Security Trust Fund* v. *McDowell*, 673 F.2d 1341 (9th Cir. 1982) (table).

[17] Subsection (c)(5) of 29 U.S.C. (Supp. IV) 186 sets out the rules governing the administration of employee pension and welfare trust funds. It requires (A) that the employer's payments be held in trust for the purpose of making medical, pension, compensation or insurance payments for the benefit of employees and their families and dependents; (B) that the detailed basis on which such payments are to be made be specified in a written agreement with the employer and that the employers and employees be equally represented in the administration of the fund; and (C) that such payments as are intended to be used for providing pensions or annuities be paid to a separate trust.

[18] Unlike in *Kaiser Steel*, *supra*, slip op. 15-16, there is no question of implied repeal here because, as we showed above (pages 14-24, *supra*), the policies underlying Section 8(f) are not offended by the retrospective enforcement of obligations that accrued under

This Court recently construed Section 306(a) in *Kaiser Steel Corp.* v. *Mullins, supra.* There, the collective bargaining agreement between Kaiser and the union required Kaiser to make contributions to employee benefit funds based on each ton of coal produced, each hour worked by covered employees, and each ton of coal purchased from operators that did not contribute to the trusts pursuant to the contract. Slip op. 1-2. When the trustees of the funds sued Kaiser to recover contributions due for the coal it had purchased from non-contributing operators, Kaiser defended on the ground that the purchased coal provision was void and unenforceable as violative of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, and Section 8(e) of the NLRA, 29 U.S.C. 158(e). Slip op. at 3. The district court granted summary judgment for the trustees and the court of appeals affirmed, both rejecting Kaiser's illegality defense without deciding the legality of the purchased coal clause. *Ibid.* This Court reversed, holding that "illegal promises will not be enforced in cases controlled by federal law," *id.* at 4, and that Section 306(a), assuming it was applicable, did not alter that result, slip op. 15. The Court expressly rejected the contention that Section 306(a) abolished illegality defenses, concluding instead that the provision "explicitly requires employers to contribute to pension funds only where doing so would not be 'inconsistent with law.'" *Ibid.* The Court noted that Senator Williams and Representative Thompson "did not say that employers should be prevented from raising all defenses; rather they spoke in terms of 'unrelated' and 'extraneous' defenses" (*ibid.*; footnote omitted).

The decision below is fully consistent with *Kaiser Steel.* Unlike Section 8(e) of the National Labor Relations Act, which expressly makes agreements prohibited thereunder

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a contract authorized by that Section. At all events, even if there were any such incompatibility, the foregoing legislative history would be "'clear and manifest'" evidence of Congress' intent to modify Section 8(f) to the extent it is inconsistent with Section 306(a).

"unenforceable and void," prehire agreements are specifically sanctioned by Section 8(f) of the Act. As shown above (pages 8-9, *supra*), it would not be inconsistent with law or illegal for petitioner to honor the prehire agreement in the absence of the Union's establishment of majority status. Rather, petitioner and the Union voluntarily could continue the agreement in effect indefinitely so long as the covered employees did not seek a representation election. As Judge Wilkey, whose dissenting views in *Mullins* v. *Kaiser Steel Corp.*, 642 F.2d 1302, 1320-1335 (D.C. Cir. 1980), were adopted by this Court, explained in *Overhead Door Co.*, *supra*, 681 F.2d at 4-5 (emphasis in original; footnotes omitted),

> [t]he *Mullins* [*Kaiser Steel*] decision rested on the alleged *illegality* of the contract. Since payment by Overhead Door to the Funds pursuant to the prehire agreements would not be illegal, as allegedly would payment by a coal producer pursuant to the purchased coal clause, *Mullins* may be distinguished. More important, the Court specifically cited legislative history indicating that the 1980 Act was intended to reverse the result in this very case. 'Both [the House and Senate floor managers of the bill] also stated that they . . . disapproved cases such as *Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.*, 488 F. Supp. 816 (DC 1980), *appeal pending* . . .' This specific reference in the legislative history, combined with the Act's purpose of making it easier for union funds to recover unpaid contributions, provides support for a holding that Overhead Door may not defend this suit on the basis of the alleged unenforceability of section 8(f) agreements.[19]

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[19] Although the District of Columbia Circuit was of the view (681 F.2d at 4) that "[t]here are substantial reasons for believing that the combined effect of [*Kaiser Steel*] and the [MPPA] is to prohibit an employer from defending a trust fund suit on the basis of the alleged unenforceability of prehire agreements," it nevertheless determined (*id.* at 5) not to resolve the *Overhead Door* case on the basis of Section 306(a). Rather, in view of the retroactivity question (see pages 29-30, *infra*), the failure of the appellants in the case to rely on the provision directly, and the fact that "the

Moreover, as shown above (page 28, *supra*), petitioner's contention concerning the Union's lack of majority status is "unrelated" to petitioner's responsibility for pre-repudiation payment obligations. While the Union's minority status enabled petitioner to repudiate the contract, it did not render it void or unlawful and thus did not eliminate obligations that had accrued prior to the repudiation.[20]

B. Section 306(a) Is Applicable to This Case

As the law currently in effect, Section 306(a) is applicable to this case notwithstanding that the MPPA was not in effect at the time the Agreement was signed. In *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974), this Court held that an appellate court is bound to "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." See also *Hutto* v. *Finney*, 437 U.S. 678, 694-695 n.23 (1978); *Cort* v. *Ash*, 422 U.S. 66, 76-77 (1975); *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 281-282 (1969); *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801).[21] For the reasons stated

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unavoidable effect of preventing employers from raising the unenforceability defense in cases such as this one will be to make prehire agreements enforceable, at least retrospectively" (681 F.2d at 5), the court "prefer[red] to resolve this issue on the basis of the history and purpose of section 8(f) * * *" (*ibid.*) (see pages 12-13, *supra*).

[20] As we showed above (pages 8-24, *supra*), prehire agreements are retrospectively, but not prospectively, enforceable under 29 U.S.C. 185. Section 306(a) of the MPPA does not alter this distinction. It deprives neither an employer of its right to repudiate or modify the agreement before the union establishes majority status nor employees of their right to petition for a representation election.

[21] In *Kaiser Steel*, *supra*, the Court assumed *arguendo* that Section 306 applied to an agreement signed before the Act's effective date. Slip op. 15. The dissent was convinced of Section 306's applicability based on its analysis of *Bradley* v. *Richmond School Board*, *supra*, slip op. 2-3 n.1 (Brennan, J., dissenting).

at pages 31-35 of our brief in *Kaiser Steel, supra*,[22] and by Justice Brennan in his opinion dissenting on other grounds in that case (at 2-3 n.1), we submit that neither the language nor the legislative history of Section 306(a) contains any suggestion that it was not intended to apply to pending cases; nor would the application of that provision in this case result in "manifest injustice."[23]

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[22] We are serving a copy of that brief on counsel for the parties in this case. See also pages 7-8, *supra*, summarizing the views stated in our brief in *Kaiser Steel* as they apply to this case.

[23] The defense of unenforceability does not assert a vested private right. See *Bradley, supra*, 416 U.S. at 720. Surely petitioner cannot claim that a prehire agreement obligating it to contribute to the funds vested in it a matured, unconditional right *to be free* from having to make those contributions.

Moreover, that the issue presented here is one of "great national concern" (*Bradley, supra*, 416 U.S. at 719, quoting 5 U.S. (1 Cranch) 102, 110 (1801)), was made clear in statements made by Senator Williams and Representative Thompson (126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980) (emphasis added); *id.* at S11673 (emphasis added):

> Because delinquencies of employers in making required contributions are also a serious problem for many multiemployer plans, we wish to make clear the public policy in this area, which this bill is intended to further. Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorney's fees and other legal costs arise in connection with collection efforts.
>
> These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability for all employers.
>
> * * * *Sound national pension policy* demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

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OCTOBER 1982

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No. 81-2150

IN THE

Supreme Court of the United States

October Term, 1982

JIM MCNEFF, INC., a California Corporation,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

RESPONDENTS' OBJECTIONS TO MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS BY THE CARPENTERS TRUST FUNDS FOR SOUTHERN CALIFORNIA, THE CONSTRUCTION LABORERS TRUST FUNDS FOR SOUTHERN CALIFORNIA AND THE CEMENT MASONS TRUST FUNDS FOR SOUTHERN CALIFORNIA.

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Respondents Frank L. Todd, *et al.*, object to the filing of the Brief *amici curiae* in support of Respondents on behalf of the Carpenters Trust Funds for Southern California, the Construction Laborers Trust Funds for Southern California and the Cement Masons Trust Funds for Southern California and, therefore, file this opposition to the granting of the Motion for Leave to File Brief *amici curiae* in support of Respondents, on grounds as follows:

1. Although the proffered Brief *amici curiae* purports to support Respondents, the counsel of record for the *amici*

curiae has a conflict of interests in supporting the views of Respondents. Respondents are trustees of labor-management employee benefit trusts who frequently must file suits to recover delinquent payments due from employers. Counsel of record for these *amici curiae*, John H. Stephens, Esq., and the law firm of Cox, Castle & Nicholson, have been during the past ten years and are presently serving as counsel for defendant employers in suits brought by Respondents as plaintiffs. The duties of Mr. Stephens and the firm of Cox, Castle & Nicholson in representing such defendant employers have caused, and presently cause, them as counsel in those cases to make arguments and to seek the advancement of contentions which are adverse to the interests of Respondents, and which impinge upon the issues presented in this case.

2. Certain of the arguments and contentions set forth in the Brief *amici curiae* reflect the conflict of interests of counsel of record for the *amici curiae* by seeking to advance the interests of delinquent employers. Those arguments and contentions are viewed by Respondents as clearly erroneous, and as adverse to the views and interests of Respondents and similar employee benefit trusts.

3. The Brief *amici curiae* is untimely under Rule 36.2 and 36.3 of this Court, which requires the motion to be filed "within the time allowed for the filing of the brief of the party supported and if in support of neither party, within the time allowed for filing . . . petitioner's brief." Although the Brief *amici curiae* in question purportedly supports Respondents, the objectionable arguments described above do not, in fact, support Respondents. Therefore, the motion and the brief should have been filed, if at all, "within the time allowed for filing . . . petitioner's brief." Since the motion for leave to file the Brief *amici curiae* was not filed until the date Respondents' brief was filed, Respondents

would have no appropriate opportunity to answer the erroneous contentions made by the Brief *amici curiae* if the motion for leave to file the brief is granted.

Conclusion.

Based on the foregoing, the motion made on behalf of Carpenters Trust Funds, etc., *et al.*, for leave to file the Brief *amici curiae* in support of Respondents should be denied.

Dated: November 4, 1982.

Respectfully submitted,

WAYNE JETT,*
JETT, CLIFFORD & LAQUER,
JULIUS REICH,
REICH, ADELL & CROST,
Counsel for Respondents,
Frank L. Todd, et al.
**Counsel of Record.*

NO. 81-2150-CFX	TITLE	Jim McNeff, Inc., Petitioner v. Frank L. Todd, et al.

DOCKETED	COURT
May 7, 1982	United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: James T. Winkler
	Counsel for Respondents:
May 7, 1982	Petition for writ of certiorari filed. (Record filed).
June 3, 1982	Order extending time for respondents to file a response to the petition until July 2, 1982.
June 17, 1982	Brief for respondents in opposition filed.
June 21, 1982	DISTRIBUTED. SLIPP 6-24.
June 24, 1982	REDISTRIBUTED. 6-30.
June 28, 1982	Reply and supplemental brief for the petitioner filed. (D).
July 2, 1982	Petition GRANTED. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

July 30, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until Aug. 30, 1982.
Aug. 30, 1982	Brief, amicus curiae, of The Associated Builders and Contractors in support of petitioner filed.
Sept. 2, 1982	Joint appendix filed.
Sept. 2, 1982	Brief for the petitioner filed.
Sept. 23, 1982	Order extending time to file the respondents' brief on the merits until November 1, 1982.
Nov. 1, 1982	Brief, amicus curiae, for the U. S. filed.
Nov. 1, 1982	Brief for the respondents filed.
Nov. 1, 1982	Brief, amicus curiae, for Loyola of Los Angeles Law Review filed.
Nov. 2, 1982	Motion for The American Federation of Labor and Congress of Industrial Organizations, et al. for leave to file a brief as amici curiae filed.
Nov. 2, 1982	Brief, amicus curiae, of The National Coordinating Committee for Multiemployer Plans in support of respondents filed.
Nov. 4, 1982	Motion of The Carpenters Trust Funds for Southern California et al. for leave to file a brief as amici curiae filed.
Nov. 9, 1982	Respondents' objections to Motion of The Carpenters Trust Funds for Southern California, et al. for leave to file a brief as amici curiae filed.
	(Over)

81-2150

Title

No.

DATE	PROCEEDINGS AND ORDERS
Nov. 15, 1982	The motion of American Federation of Labor and Congress of Industrial Organizations, et al. for leave to file a brief as amici curiae is GRANTED. The motion of Carpenters Trust Funds of Southern California, et al. for leave to file a brief as amici curiae is GRANTED.
Nov. 17, 1982	CIRCULATED.
Jan. 10, 1983	Reply brief for the petitioner filed. (D).
Jan. 17, 1983	ARGUED.